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Youth hostel - Fort Mason

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SF
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76-1

SF City Attorney

Letter Opinion No. 76-1

January 6, 1976

Hon. George R. Moscone
Mayor-Elect
54 Mint Street
San Francisco, Calif. 94103

MAR 13 1978

DOCUMENTS DEPT.
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Subject: Residence Requirements for
City Boards and Commissions

Dear Mayor-Elect Moscone:

This office has reviewed your letter of December 31, 1975, in which you request an opinion regarding Section 8.100 of the San Francisco Charter as it applies to City boards and commissions.

Section 8.100 provides in relevant part,

"No person . . . shall be appointed as a member of any board or commission unless he shall have been a resident of the city and county for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office"

The requirements of Section 8.100 and their validity were discussed in Opinion No. 74-94 issued on September 3, 1974.

You have enclosed a copy of a letter addressed to you mentioning the recent California Supreme Court decision in the case of Johnson v. Hamilton, 15 C.3d 461, 125 Cal.Rptr. 129 (October 27, 1975). You have asked that Opinion No. 74-94 be reconsidered in light of this decision.

In that opinion, No. 74-94, it was concluded that recent decisions invalidating waiting-period residency requirements for elective positions had no application to appointive positions on boards and commissions. A copy of the opinion is enclosed.

Hon. George R. Moscone

2

January 6, 1975

In Johnson v. Hamilton (supra) the petitioner, a candidate for city councilman, challenged a provision of the Long Beach City Charter requiring one year residence in the city preceding election or appointment to any board or commission of the city as well as six months residence in the district in which a candidate (for city council) is nominated. Though the Long Beach Charter section in question applied both to elective offices and appointive positions on boards and commissions, the petitioner in the Johnson case sought elective office. The court's opinion reviewed the charter provision in terms of its impact on the right to vote and to seek public office, as well as on the right to travel. Therefore, it must be concluded that the holding in Johnson ultimately only applied to elective offices and only reiterates the ruling set down in Thompson v. Mellon, 9 C.3d 96 106, that no residency requirement may require a prospective candidate to be a resident for more than thirty days prior to his filing nominating papers or equivalent declaration of candidacy. The decision in Thompson v. Mellon (supra) was analyzed and discussed in Opinion No. 74-94. Neither Thompson v. Mellon (supra) nor Johnson v. Hamilton applies to the validity of the residency and elector requirements for appointment to boards and commissions as set forth in Charter Section 8.100.

Therefore, in my opinion, it must be concluded that the rule of law set forth in Opinion No. 74-94 remains unchanged and the residence and elector requirements of Charter Section 8.100 are still valid and applicable to appointive positions on boards and commissions.

Very truly yours,

Thomas M. O'Connor
THOMAS M. O'CONNOR
City Attorney

BED

January 7, 1976

MAR 13 1978

Mr. Alfred Goldberg, Superintendent
Bureau of Building Inspection
450 McAllister Street, Room 202
San Francisco, California

DOCUMENTS DEPT.
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Subject: Requiring Federal Reserve Bank
To Take Out Permits for Maintenance
Work Performed by Its Own Staff

Dear Mr. Goldberg:

This is in response to your letter asking whether the Federal Reserve Bank of San Francisco is subject to the permit requirements of the Building, Electrical and Plumbing Codes.

In my opinion it is. Those codes do not exempt the federal reserve banks therefrom and Congress has not undertaken to exempt them.

Federal reserve banks exist pursuant to the Federal Reserve Act (12 U.S.C. §221 et seq.) and are agencies of the Federal Government. (Fed. Reserve Bank v. Register of Deeds, 288 Mich. 120, 284 N.W. 667, 668; Geery v. Minnesota, 202 Minn. 366, 278 N.W. 594, 595; Fed. Reserve Bank v. Department of Revenue, 339 Mich. 587, 64 N.W.2d 639, 641; Raichle v. Fed. Reserve Bank, 34 F.2d 910.)

Congress, by 12 U.S.C. §531, has provided:

"Federal reserve banks, including the capital stock and surplus therein and the income derived therefrom, shall be exempt from Federal, State, and local taxation, except taxes upon real estate,"

and Congress could exempt those banks from the permit requirements of local codes. But, as stated, it has not done so.

You attach a letter from Mr. W. G. De Vries, Senior Vice President, stating that the bank wishes to cooperate with your office to the fullest extent possible, and that "We do, therefore, require outside contractors who perform building, electrical, or plumbing work for us to obtain all necessary permits. However, we have never obtained permits for work which our own maintenance staff can do."

Mr. Alfred Goldberg

2

January 7, 1976

Sec. 30.1. of the Building Code specifies certain work -- which may fall in the category of "maintenance" -- for which a permit is not required, but no provision exempts work from permit requirements because it is performed by the staff instead of outside contractors.

If a permit is required for the particular type of maintenance work, the bank is not relieved of the duty to obtain a permit because its staff performs the work.

You, of course, would exercise a proper discretion in determining whether a permit was required for the particular maintenance work involved.

Very truly yours,

GEK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-3

January 7, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, Calif.

Subject: Placement of Candidates'
Names on Ballots

Dear Mr. Boreman:

This is in response to your letter of November 13, 1975, which requests that,

" . . . legislation be prepared . . . which would provide that in the event persons with the same surname are seeking the same public office, their names would be placed together on the ballot and that first names and surnames of such candidates be in bold print."

Article 11, §5(b) of the California Constitution provides in relevant part,

"It shall be competent in all city charters to provide, . . . for: . . . (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees . . . shall be elected"

Mr. Gilbert H. Boreman

2

January 7, 1976

Pursuant to that constitutional authorization the Charter of the City and County of San Francisco provides in 9.100 et seq for the election of public officials including the preparation of and placement of names on the ballot and any change in the present procedure for placing names on the ballot will require an appropriate charter amendment.

However, in my opinion that part of your proposal which would provide that the first and surnames of persons bearing the same name be placed together on the ballot in bold-faced type would immediately come to the attention of voters and such bold-faced typing would confer an advantage on those candidates identified in that manner.

In the recent case of Gould v. Grubb, 14 C.3d 661 (1975) the Supreme Court of California held unconstitutional an election procedure set forth in the Santa Monica Charter which afforded incumbents, seeking reelection, a top position on the ballot. The trial court had found that the first-place position on the ballot afforded the candidate occupying that position a substantial advantage over lower-placed candidates.

The Court concluded that such a procedure allocating an advantageous position to a particular class of candidates "... inevitably discriminates against voters supporting all other candidates. . . ." Santa Monica was unable to establish that the procedure was necessary to further a compelling governmental interest.

It must be concluded that a procedure whereby some candidates names would appear in bold-faced type on the ballot would in a similar manner confer an advantage on those candidates and violate equal protection of the laws, there being other means of avoiding voter confusion which would be less disruptive of the fundamental rights to seek public office and to vote.

Requiring that names of candidates bearing the same name appear together on the ballot would be permissible but would require a charter amendment. Should you wish such an amendment, please consult this office.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-4

January 15, 1976

MAR 13 1978

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Mr. Thomas C. Scanlon
Treasurer
Room 110, City Hall
San Francisco, California 94102

Re: Legality of Board of Supervisors' Resolution Regarding
Homeowners' Monthly Payments of Taxes to Lending
Institutions.

Dear Mr. Scanlon:

This is in response to your request for my opinion regarding the effect of Resolution No. 705-75 of the Board of Supervisors. This resolution urges you to stop investing City monies in any financial institution which refuses to voluntarily remit to the City and County of San Francisco all monthly property tax payments, as received, collected from homeowners.

It is my opinion that this resolution is not binding upon you for two reasons. First, the resolution is expressed in terms of urging rather than directing this investment policy.

Secondly, and most importantly, regulation of banks is a state affair rather than a municipal affair. New Rochelle Trust Co. v. White (1940) 283 N.Y. 223, 28 N.E. 2d 337. The authority of the state to regulate banks is found in its general police powers. Bank of Italy v. Johnson (1926) 200 C 1. The term banks includes associations engaged in moneyed transactions including the deposit and loaning of money. Oulton v. German Savings & Loan Society (1926) 84 U S 109. Resolution No. 705-75 in seeking to have financial institutions remit to the City, as collected, monthly

Mr. Thomas C. Scanlon

2

January 15, 1976

property tax payments is an attempt to regulate these financial institutions by requiring that they follow certain procedures not required or authorized by State law. The collection and payment of ad valorem taxes is governed by State law. Section 2600 through 2771 of the Revenue and Taxation Code provides the specific dates on which property tax payments are due. The City and County of San Francisco is without the power to require payment at other times by legislation or by coercion.

An acknowledgment of the State's exclusive authority over the deposit of public funds is found in our own Charter. Section 6.311 states in pertinent part as follows:

"The deposit of public funds shall be governed by state law enacted under the authority of Article XIII, Sections 38 and 39 of the Constitution."

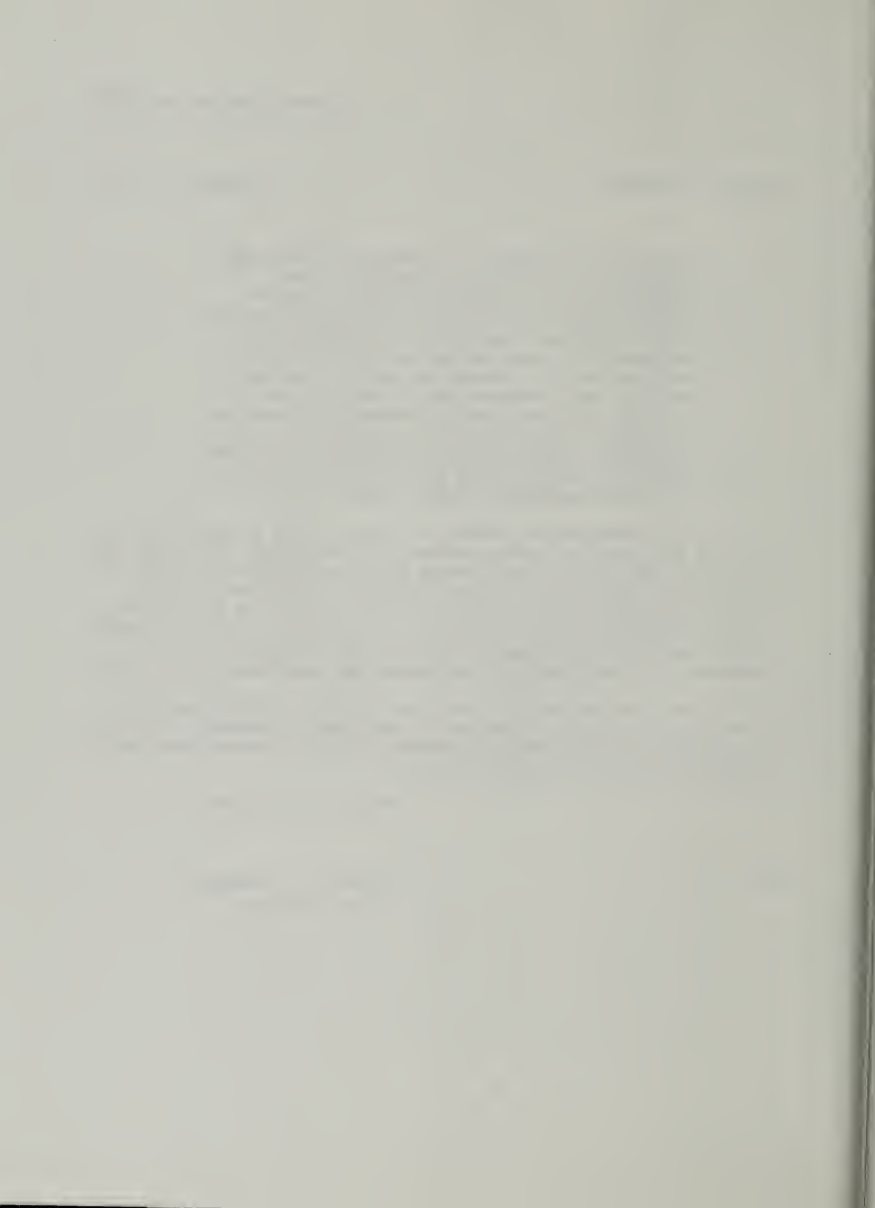
Although these sections of Article XIII were repealed on November 5, 1974, Section 53637 of the Government Code requires that the monies of local agencies be deposited in banks agreeing to pay the highest rate of interest.

You are advised accordingly.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

WPL



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SF City Attorney

Letter Opinion No. 76-6

January 15, 1976

MAR 13 1978

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Mr. Thomas J. Mellon
Chief Administrative Officer
289 City Hall
San Francisco, California 94102

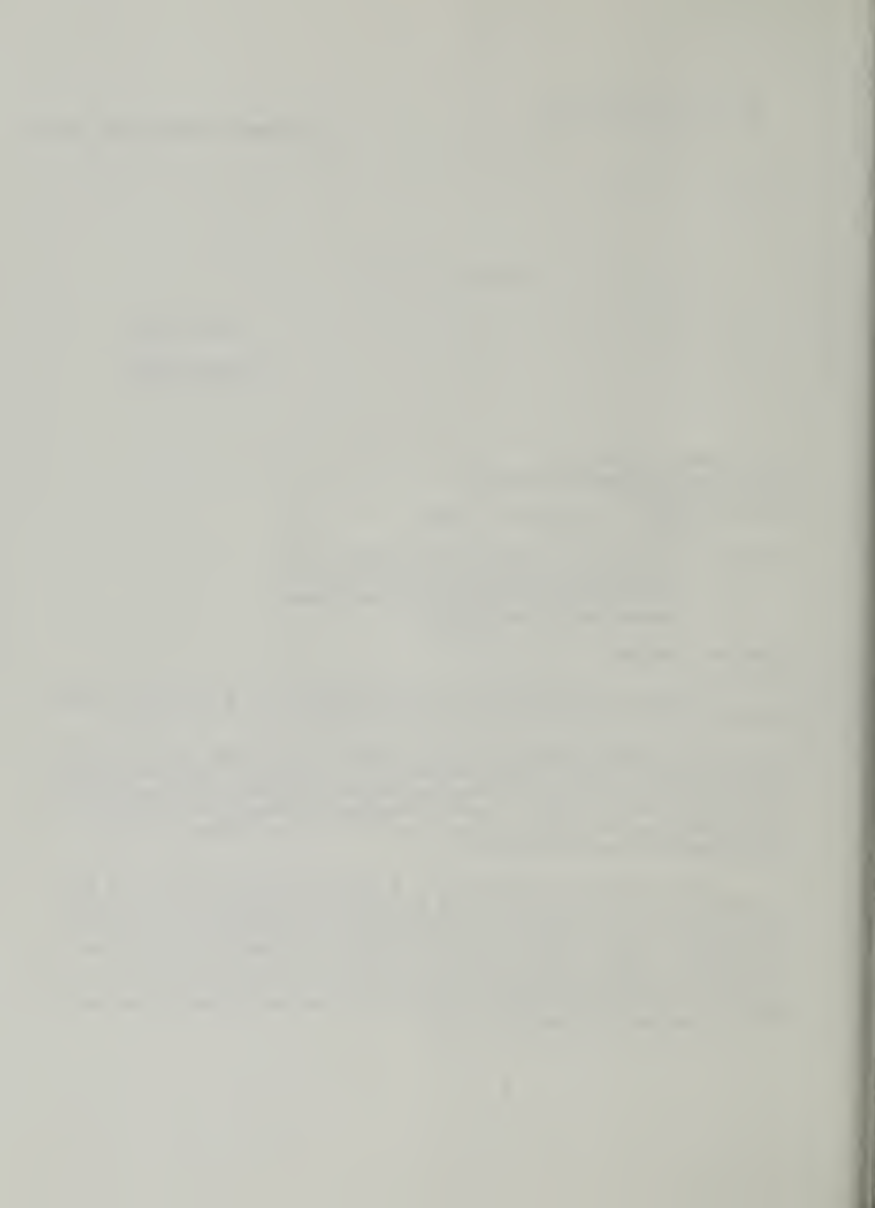
Subject: Questions Regarding the Moving of
the Employee Relations Division
from the Jurisdiction of the Chief
Administrative Officer

Dear Mr. Mellon:

This is in response to your request for my opinion regarding questions relating to the above subject.

Your first question asks whether or not the transfer of the functions of the Employee Relations Division from the Chief Administrative Officer to another department or board would defeat the purpose of a recent Charter amendment making the director of said division appointed by and serving at the pleasure of the Chief Administrative Officer.

The intent of Proposition I adopted by the voters of San Francisco in the November 1974 election was apparently to remove the position of Employee Relations Director from the provisions of regular civil service restrictions by making that position appointive rather than subject to civil service examination. The Employee Relations Division had already been placed in the office of the Chief Administrative Officer by virtue of Ordinance No. 409-73 adopted October 25, 1973.



Mr. Thomas J. Mellon

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January 15, 1976

While the adoption of an ordinance transferring the functions of the Employee Relations Division to another department or board while the director remains subject to the authority of the Chief Administrative Officer would certainly create unique working relationships in said division, it cannot be legally concluded therefrom that such circumstances "defeat" the purpose of the Charter provision in question. The Charter amendment, it should be pointed out, actually only dealt with the director and not the division.

Your second inquiry asks whether or not the Chief Administrative Officer's recommendation is necessary before the Employee Relations Division could be removed from the jurisdiction of the Chief Administrative Officer.

It is my opinion that Section 2.101 of the Charter, which requires the Chief Administrative Officer's recommendation before a department may be created or abolished in or from his jurisdiction, is not applicable in this particular instance. This conclusion is based upon the fact that the Board of Supervisors in adopting Ordinance No. 409-73 created a "division" "in the office of the Chief Administrative Officer" as opposed to creating a department under, but separate from, the Chief Administrative Officer (Charter §3.510.) It appears from examining the ordinance (409-73) that the apparent intent thereof was to create a unit within the Chief Administrative Officer's office for the purpose of carrying out the provisions of state legislation (Meyers-Miliias-Brown Act) dealing with employee-employer relations on the local level. Presumably, if the Board of Supervisors contemplated creating a department, that term rather than the term "division" would have been utilized.

Although your consent to transfer of the division from your jurisdiction is not required, it is also my opinion that you cannot give your consent to have the director be appointed or serve at the pleasure of any other officer, board or commission. The Charter requires that only the Chief Administrative Officer shall have the power of appointment and removal of the Employee Relations Director.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

MHM

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SF City Attorney

Letter Opinion No. 76-7

January 16, 1976

Mr. Gilbert H. Boreman
Clerk of the Board
Room 235 City Hall
San Francisco, CA 94102

SUBJECT: Liability Insurance for Street Artists and
Design Approval for Their Display Stands

Dear Mr. Boreman:

This is in reply to your letter wherein you ask whether the Board of Supervisors may require street artists to carry public liability insurance and whether the Art Commission can pass on the appropriateness of the design of the street artists' display stands.

It should be pointed out to start with that there is no "permit" requirement for street artists. What is required under the provisions of the ordinance is a "certificate".

Proposition "L", the "Street Artist Ordinance", was approved by the electorate. No ordinance approved by the electorate shall be amended or repealed except by vote of the electorate unless the ordinance otherwise provides. See: San Francisco Charter §9.114. Proposition "L" does not "otherwise provide" and, accordingly, no ordinance could be adopted by the Board which would have the effect of amending part of the initiative ordinance. It is my opinion that special legislation requiring liability insurance for street artists would be an

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Gilbert H. Boreman

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January 16, 1976

amendment to this ordinance and subject to attack on the above grounds.

For similar reasons, I would further advise you that it would not be proper for the Art Commission to pass on the "design" of the street artist display stands. By the word "design", I am assuming that you are referring to the aesthetics of the displays rather than their dimensions. The latter are regulated by Ordinance No. 489-75 and can be regulated in even more detail since the dimensions have a direct relation to the noninterference with pedestrian and vehicular traffic. Such displays would not be structures within the contemplation of Charter Section 3.601.

Very truly yours,

DM

THOMAS M. O'CONNOR
City Attorney

January 19, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Residence Requirements for Members of Retirement Board

Dear Mr. Boreman:

On behalf of Supervisor Quentin L. Kopp, you have requested that I review and advise you concerning residence requirements as they apply to members of the Retirement Board of the San Francisco City and County Employees' Retirement System.

Section 3.670 of the Charter creates the Retirement Board, which "shall consist of the president of the board of supervisors, three members to be appointed by the mayor, and three members elected from the active members [of the Retirement System] . . ."

Subsection (a) of Section 8.100 of the Charter provides:

"No person shall be a candidate for any elective office nor shall be appointed as a member of any board or commission unless he shall have been a resident of the city and county for a period of at least five years and an elector thereof for at least one year immediately prior to the time of his taking office, unless otherwise specifically provided in this charter, and every elected officer and member of any board or commission shall continue to be a resident of the city and county during incumbency of office, and upon ceasing to be such resident, shall be removed from office."

:

Mr. Gilbert H. Boreman

-2-

19 September 1976

As can be seen, Section 8.100 seeks to impose two different residence requirements: the first, a durational residence requirement as a qualification for appointment or election to the Board; and the second, a requirement that residence in San Francisco be maintained during incumbency as a member of the Board.

The President of the Board of Supervisors is a member of the Retirement Board ex officio. Consequently, the applicability of the provisions of Section 8.100 to that member of the Retirement Board must be determined on the basis of their applicability to a member of the Board of Supervisors. Durational residency requirements for candidates for elective public office, such as the Board of Supervisors, may not exceed 30 days prior to the filing of nominating papers or equivalent declaration of candidacy. (Johnson v. Hamilton, 15 C.3d 461; Thompson v. Mellon, 9 C.3d 96, 106.) The requirement of residency during incumbency as a member of the Board of Supervisors is valid and would, therefore, require that a member of the Board of Supervisors be a resident of the City and County while holding that office.

The three members of the Retirement Board appointed by the Mayor hold "appointive" offices as opposed to "elective" offices. In Opinion 74-94, I concluded that the provisions of subsection (a) of Section 8.100 are applicable, in their totality, to appointive offices. A copy of that opinion is enclosed for your information. Therefore, it is my opinion that the appointive members of the Retirement Board are each subject to all of the requirements of subsection (a) of Section 8.100, that is, the requirements as to residence as a qualification for appointment as well as the requirement that residence in the City and County be maintained during incumbency as a member of the Retirement Board.

The three members of the Retirement Board elected from among the members of the Retirement System are not, in my opinion, "elective" officers as that term is used in subsection (a) of Section 8.100. Neither can they be considered as "appointive" officers. Consequently, the three employee members of the Retirement Board are not subject to either of the residence requirements set forth in subsection (a) of Section 8.100. (See Opinion No. 70-1, dated January 6, 1970, a copy of which is attached.)

Very truly yours,

DJG

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney
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≡ Letter Opinion No. 76-9

January 19, 1976

MAR 13 1978

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Mr. John J. Spring,
General Manager
Parks & Recreation Department
McLaren Lodge
Golden Gate Park
San Francisco, California 94117

Attn: Mr. Joseph Misuraca

Dear Mr. Spring:

This office has reviewed your letter in which you seek an opinion regarding the policy of allowing private organizations to use public recreational facilities. Your letter refers to a citizen's complaint that the tennis courts at Golden Gate Park were used for a tennis tournament open only to persons of Filipino ancestry.

You have advised this office that the Recreation and Park Department regularly allows private organizations to use city tennis courts, basketball courts, baseball diamonds, etc., for organizational activities. In the case of the Filipino Tournament 6 or 7 of the 24 courts at Golden Gate Park are annually reserved for the organization which holds tournaments for four days (two weekends). You have further explained throughout the city there are 147 public tennis courts under the jurisdiction of the Recreation and Park Department and another 31 tennis courts under the jurisdiction of the Board of Education.

The by-laws of the Filipino Tennis Club of Northern California (which sponsors the tournament in question and which reserved the tennis courts) provides, in Article II,

Mr. John J. Spring

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January 19, 1976

"Filipino or anyone with Filipino ancestry or marriage to a Filipino shall constitute eligibility for membership."

The equal protection clause of the Fourteenth Amendment to the United States Constitution (Section 1 thereof) provides in relevant part, " . . . nor shall any state . . . deny to any person . . . the equal protection of the laws." (emphasis added). If the city were to allow or deny use of park facilities on the basis of national origin, or alienage, such a classification would be suspect and only allowed if the city could establish that the classification scheme served a compelling public purpose. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); Sugarman v. Dougall, 413 U.S. 634, 93 S.Ct. 2842 (1973); Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); Purdy & Fitzpatrick v. State of California, 71 C.2d 566, 79 Cal.Rptr. 77, 456 P.2d 645 (1969). No compelling interest could be advanced to justify such a procedure.

However, in the instant case, the city has merely reserved space on public courts for a private organization which in turn admits members on the basis of alienage or national origin. As emphasized above, the equal protection clause of the Fourteenth Amendment inhibits state action but it does not proscribe private or individual conduct. Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); Shelley v. Kraemer, 334 U.S. 1 68, S.Ct. 836, 92 L.Ed. 1161 (1948); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed. 2d 45 (1961); Peterson v. Greenville, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963); Copper v. Aaron, 358 U.S. 11, 78 S.Ct. 1101, 3 L.Ed.2d 5 (1958).

The question then is whether there is state action when a private organization (which qualifies members on the basis of alienage or national origin), with city permission, holds a members only tennis tournament on 6 or 7 of the city's 170+ tennis courts for four days. In Burton v. Wilmington Parking Authority (*supra*) the Court notes, page 722 of 365 U.S.,

" . . . private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the state in any of its manifestations has been found to become involved in it."

Mr. John J. Spring

3

January 19, 1976

In Reitman v. Mulkey, 387 U.S. 367, 378, 87 S.Ct. 1627, 1632, 18 L.Ed.2d 830, 836 (1967) the Court noted that it had,

" . . . never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations."

As stated in Burton v. Wilmington Parking Authority (supra) at page 722,

" . . . only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

In Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972) the Court found no state involvement in a private club's discrimination on its own property by virtue of the state's issuance of a liquor license to that club. In Moose Lodge, the Court, at page 175 of 407 U.S. contrasted its fact situation with that in Burton v. Wilmington Parking Authority (supra) where a public garage leased restaurant space in the garage to a private company which served whites only and concluded,

"Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, . . ."

In Gilmore v. Montgomery, 417 U.S. 556, 570, 94 S.Ct. 2416, 41 L.Ed.2d 304, 317, (1974) the Court was unable on the record before it to decide whether,

" . . . the use of zoos, museums, parks, and other recreational facilities by private school groups in common with others, and by private nonschool organizations, involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds."

Mr. John J. Spring

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January 19, 1976

In the Gilmore case, however, there was a history of impermissible intentional segregation in schools, the integration of which had been ordered by a Federal Court. The concern of the Court was whether the policies tended directly to contravene the School desegregation order.

In the instant case, there is occasional use of recreational facilities by various private organizations, and there is no evidence of past or present official discrimination, the perpetuation of which is sought through the devise of private organizations.

The problem posed herein is compounded by the competing First Amendment right to freedom of association. Said the Court, in Gilmore v. City of Montgomery (supra), at page 575 of 41 L.Ed.2d,

"We close with this word of caution. It should be obvious that the exclusion of any person or group -- all-Negro, all Oriental, or all-white from public facilities infringes upon the freedom of the individual to associate as he chooses. Mr. Justice Douglas emphasized this in his dissent, joined by Mr. Justice Marshall, in Moose Lodge. He observed, "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 US, at 179-180, 32 L.Ed 2d 627. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change. Because its exercise is largely dependent on the right to own or use property, Healy v. James, 408 US 169, 181-183, 33 L Ed 2d 266 (1972), any denial of access to public facilities must withstand close scrutiny and be carefully circumscribed. Certainly, a person's mere membership in an organization which

Mr. John J. Spring

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January 19, 1976

possesses a discriminatory admissions policy would not be ground for his exclusion from public facilities. Having said this, however, we must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action. Norwood v. Harrison, 413 US, at 470, 37 L Ed 2d 723."

Therefore, if the city were to examine the membership policies of all organizations to decide whether any organization should be allowed occasionally to use public facilities for organizational events, such a city policy would inevitably and impermissibly weigh on the association rights of their members and thus violate the First Amendment.

In Slaton v. Board of Commissioners, 233 Md. 57, 195 A2d 41 (1963), it was noted that,

"A mere casual or occasional use of or permission to use, public facilities by a private organization does not 'involve' the State in the conduct and affairs of the organization to such 'significant extent' as to require the private organization to operate on a nonsegregated basis."

You are therefore advised that you may permit the Filipino Tennis Club of Northern California to use 6 or 7 of your courts for its annual four day tournament.

Very truly yours,

BED

THOMAS M. O'CONNOR
City Attorney

January 22, 1976

MAR 13 1978

DOCUMENTS DEPT.
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Keith P. Calden, Chief
San Francisco Fire Department
260 Golden Gate Avenue
San Francisco, CA 94102

SUBJECT: Use of Fire College Premises
for Educational Courses

Dear Chief Calden:

In your letter dated December 3, 1975, you state that an organization by the name of The Institute for Professional Development has inquired concerning the use of Fire College premises for the purpose of conducting classes for firefighters. The institute, under the aegis of St. Mary's College, will offer social science courses leading towards a Bachelor of Arts degree. The firefighters attending the classes will bear some sort of tuition cost.

In a number of previous opinions of this office, the subject of private use of public facilities and equipment has been addressed. The principle for which these opinions stand is that despite the praiseworthy nature of private activities, there still must be a manifest relationship between such activities and the general public welfare in order to permit use of public facilities. See Opinion Nos. 70-4, 64-6, 1264 (1958), and 215 (1950), copies of which are attached.

Keith P. Calden

2

January 22, 1976

The joint proposal made by St. Mary's College and the institute in my opinion has at best a tenuous relationship to the general welfare of the taxpayers of the City and County of San Francisco. Additional education would seem to benefit the participant firefighters but in a way unrelated to their service with the Fire Department. Classes in fire or chemical science would seem to directly further interests of both the firefighter and the general public through improved fire suppression services. Such a direct and measurable benefit would not follow from courses in the social sciences.

Therefore you are advised that it would be improper for the Fire Department to permit the use of public buildings for the conduct of private educational classes.

Very truly yours,

PSW

THOMAS M. O'CONNOR
City Attorney

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6-11

SF - City Attorney

Letter Opinion No. 76-11

January 26, 1976

MAR 13 1978

DOCUMENTS DEPT.
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Mr. James F. Wurm
Assistant General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco, California 94102

Subject: Questions Relating to Proposition "O"
Approved by the Voters as a Charter
Amendment on November 4, 1975

Dear Mr. Wurm:

This is in reply to your request for my opinion regarding certain questions as they relate to Charter Section 8.345. As added to the Charter by Proposition "O", Section 8.345 provides in pertinent part as follows:

"In order to bring the provisions of this section to the attention of any person who may be affected thereby, each member of the uniformed force of the police department and each member of the uniformed force of the fire department on the effective date of this section, and each person appointed to the position of Q2 police officer or the position of H2 fireman on or after the effective date of this section shall be furnished a copy of the provisions of this section and shall make under oath and file in the office of the civil service commission the following declaration: 'I hereby acknowledge receipt of a copy of the provisions of Section 8.345 of the Charter of the City

Mr. James F. Wurm

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January 26, 1976

and County of San Francisco and hereby declare that during the term of my employment in either the Police Department or the Fire Department of said City and County, I shall neither instigate, participate in or afford leadership to a strike against said City and County nor engage in any picketing activity in furtherance of such a strike."

Your first question asks whether or not the proper individuals to administer said oath are the chiefs of the respective departments. The language in question does not specifically designate which City and County officer is to administer the oath or affirmation. However, by virtue of Government Code Section 1225, the Chief of Police is an officer authorized in this State to administer oaths. (Christal v. Police Commission of City and County of San Francisco (1939) 33 Cal.App.2d 564.) The rationale in Christal and the interpretations of applicable statutes therein indicate that the Chief of the Fire Department would also be authorized to administer the oath in question.

Other officers of the City and County are not precluded from administering the oath required by Charter Section 8.345 but in view of the fact the chiefs of their respective departments presently administer the constitutionally required "loyalty" oath to new employees, it appears logical that the Section 8.345 oath could and should be administered at the same time. Similarly, with regard to present employees, it appears more practical that the oath be administered at the department level by the appointing officer rather than having the employees involved report to other officers authorized to administer the oath in City and County government.

Your second question asks if, pursuant to Charter Section 8.345, the Civil Service Commission's only responsibility is the filing of the oath once administered.

It appears from the language contained in Section 8.345 that the Civil Service Commission's only clearly defined administrative requirement is the filing of the oaths after administered. However, this conclusion does not preclude a duly authorized officer of the Civil Service Commission from administering the oath if same becomes desirable.

Mr. James F. Wurm

3

January 26, 1976

Your third question asks if a policeman or fireman could be disciplined if he or she refuses to take the Section 8.345 oath. Section 8.345, as it applies to the affected employee, requires two things: (1) that he or she be made aware of the provisions of Section 8.345, and (2) declare under oath not to engage in activities proscribed by said section.

The provisions of the Charter section are couched in mandatory terms and in my opinion require that the employees in question take the oath as set forth therein. Accordingly, it is my opinion that any employee who refuses to fulfill this legal requirement could be subject to disciplinary procedures.

Your final question asks if it would be desirable for the Civil Service Commission to include the oath requirement in future Police Officer and Firefighter examination announcements.

While such a requirement under the circumstances is not necessary, it would, in my opinion, be desirable to so do.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

MCK

January 27, 1976

MAR 13 1978

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Honorable Joseph E. Tinney
Assessor
Room 101, City Hall
San Francisco, California 94102

Subject: Confidentiality of Records Relating to Assessor's
Sales Ratio Program

Dear Mr. Tinney:

This is in response to your request for my opinion on
the following questions:

- (1) Whether the Assessor's Sales Ratio Program,*
together with working papers, calculations,
analyses, computations, evaluations, and
other component parts are open to public
inspection; and
- (2) If, as a general rule, the above records and
papers are not open to public inspection,
under what circumstances must such records

* The Assessor's "Sales Ratio Program" is a computer printout
(together with the computer program on which the printout is
based) containing information about parcels of real property
which recently have been sold. The information includes
sales price, zoning of land, age and square footage of
building, etc. Some of this information is taken from
public records and some of this information is received
by way of confidential communications from the buyer or
seller.

Honorable Joseph E. Tinney

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January 27, 1976

and papers be disclosed when the Board of Supervisors is conducting an investigation of the Assessor's office pursuant to Section 25303 of the Government Code.

I have concluded that:

- (1) Under Section 408(a) of the Revenue and Taxation Code, as interpreted in Statewide Homeowners, Inc., v. Williams (1973) 30 Cal.App.3d 567, the above described records and papers are "not public documents and shall not be open to public inspection."
- (2) However, the Assessor must, under Section 408(c) of the Revenue and Taxation Code, furnish abstracts or permit access to such records, and disclose other pertinent information, to the Board of Supervisors upon request if and when such Board of Supervisors initiates "an investigation of the Assessor's office pursuant to Section 25303 of the Government Code."

The extent to which records and other information in the Assessor's office are open to public inspection is governed by Section 408 of the Revenue and Taxation Code.

Section 408 reads in pertinent part as follows:

"408. Assessor's records. (a) Except as otherwise provided in subdivisions (b) and (c) any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor, and homeowners' exemption claims, are not public documents and shall not be open to public inspection. Property receiving the homeowners' exemption shall be clearly identified on the assessment roll. The assessor shall maintain records which shall be open to public inspection to identify those claimants who have been granted the homeowners' exemption.

* * *

Honorable Joseph E. Tinney

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"(c) The assessor shall disclose information, furnish abstracts or permit access to all records in his office to law enforcement agencies, the county grand jury, the board of supervisors or their duly authorized agents, employees or representatives when conducting an investigation of the assessor's office pursuant to Section 25303 of the Government Code, the State Controller, the State Board of Equalization and other duly authorized legislative or administrative bodies of the state pursuant to their authorization to examine such records."

Section 408 was interpreted in Statewide Homeowners, Inc., v. Williams, supra. In that case, Statewide was attempting to conduct an independent check of assessment practices in San Diego County and sought to make a comparison between (1) recent sales prices of real property, and (2) the assessed values actually assigned to the properties on the next assessment roll. These comparisons involved the time consuming and burdensome task of correlating several thousand recent deeds with the parcel numbers assigned to each property by the Assessor. The Assessor's employees had already done the same work during preparation of the secured assessment roll and the results of their labors were stored in files maintained by the Assessor. It is significant that these Assessor's files did not contain confidential information, but rather was simply the result of the labors of the Assessor's employees in correlating information extracted from recent deeds with Assessor's parcel numbers, all of which information was contained in public records. When the Assessor refused to permit inspection of his files, Statewide petitioned for a writ of mandate seeking an order compelling the Assessor to permit the inspection.

The court held that these records of the Assessor, which contained no confidential information but which were the fruit of the labor of employees of the Assessor's office, were not open to public inspection. The court said:

"Under the California Public Records Act (Gov. Code, § 6250 et seq.), citizens are given the right to inspect any public record except one the disclosure of which is exempted by the provisions of section 6254. Subdivision (k) of

Honorable Joseph E. Tinney

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January 27, 1976

section 6254, in turn, broadly exempts from public inspection '[r]ecords the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law. . . .'

"The Revenue and Taxation Code specifically requires the assessor to prepare and keep certain records: county maps (Rev. & Tax. Code, § 327); records relating to claims for exemptions (Rev. & Tax. Code, §§ 251, 252, 254); certain property tax statements (Rev. & Tax. Code, § 441); an assessment roll containing certain specified information (Rev. & Tax. Code, §§ 601, 602); and an index to the roll (Rev. & Tax. Code, § 615). It also specifically provides in subdivision (a) of section 408: ' . . . any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor are not public documents and shall not be open to public inspection.' (Italics added.)

"Statewide contends the assessor's claim, and the superior court's finding, that the documents in the 'Final File' and the 'Cut Documents File' are not records which the law requires the assessor to prepare and keep are in error. Since the documents in both files are essential to the performance of the assessor's statutory duties, i.e., preparation of the assessment roll and the county property maps, it argues the law requires the assessor to prepare the documents in the files.

"Such a narrow interpretation of the exemption provided by the code section would render the section meaningless. If all of the information and papers accumulated and used by the assessor in the process of preparing the records which the law requires him to prepare and keep are themselves to be regarded as records he is required to prepare and keep, then every paper in his office would fall into the category.

Honorable Joseph E. Tinney

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"We find no provision in the law which requires the assessor to subscribe to the deed service, to make the parcel number notations on the deeds or to maintain them in the files Statewide seeks to inspect. The documents are the working papers by which the assessor updates the assessment roll and the county property maps which the law requires him to prepare and keep and make available for public inspection. But the fact the assessor uses the deeds to prepare and update the annual assessment roll and the county property maps does not make the deeds themselves records which the law requires him to prepare and keep.

"Statewide points out the records it seeks to inspect do not contain confidential information and argues the exemption provided by Revenue and Taxation Code section 408, subdivision (a), should not be applied to prohibit inspection of documents which do not contain confidential information. The confidential nature of information contained in publicly held documents is a proper basis for exemption from public disclosure, but it does not necessarily follow it is the only proper basis for exemption. In any event, the statute under consideration places exemption from public inspection on the fact the law does not require the records to be kept, not upon confidentiality. Statewide makes no claim the statute is unconstitutional. If the section gives broader exemption to the assessor's records than is accorded generally to other public records by the Public Records Act, the cure lies in amendment of the statute by the Legislature and not in a strained and unrealistic interpretation of its provisions."

The decision in Statewide Homeowners clearly is applicable to the subject records and papers; viz., the Assessor's Sales Ratio Program, together with working papers, calculations, analyses, computations, valuations, and other component parts. Under Rev. & T.C. § 408(a), such records and papers are "not public documents and shall not be open to public inspection."

The first part of the paper is devoted to a discussion of the general principles of the theory of the structure of the human mind. It is shown that the mind is a complex system of interacting elements, and that the structure of the mind is determined by the nature of these elements and the way in which they are connected. The second part of the paper is devoted to a discussion of the specific principles of the theory of the structure of the human mind. It is shown that the mind is a complex system of interacting elements, and that the structure of the mind is determined by the nature of these elements and the way in which they are connected.

The third part of the paper is devoted to a discussion of the specific principles of the theory of the structure of the human mind. It is shown that the mind is a complex system of interacting elements, and that the structure of the mind is determined by the nature of these elements and the way in which they are connected. The fourth part of the paper is devoted to a discussion of the specific principles of the theory of the structure of the human mind. It is shown that the mind is a complex system of interacting elements, and that the structure of the mind is determined by the nature of these elements and the way in which they are connected.

The fifth part of the paper is devoted to a discussion of the specific principles of the theory of the structure of the human mind. It is shown that the mind is a complex system of interacting elements, and that the structure of the mind is determined by the nature of these elements and the way in which they are connected. The sixth part of the paper is devoted to a discussion of the specific principles of the theory of the structure of the human mind. It is shown that the mind is a complex system of interacting elements, and that the structure of the mind is determined by the nature of these elements and the way in which they are connected.

Honorable Joseph E. Tinney 6

January 27, 1976

The Statewide Homeowners case did not involve subdivision (c) of Section 408 of the Revenue and Taxation Code, which qualifies the general rule set forth in subdivision (a) of that Section. Subdivision (c) provides in pertinent part as follows:

"(c) The assessor shall disclose information, furnish abstracts or permit access to all records in his office to . . . the board of supervisors or their duly authorized agents, employees or representatives when conducting an investigation of the assessor's office pursuant to Section 25303 of the Government Code, . . ."

Under Rev. & T.C. § 408(c), if and when the Board of Supervisors conducts an investigation of the Assessor's office pursuant to Section 25303 of the Government Code*, the Assessor must disclose information, and furnish abstracts or permit access to all records in his office, including information and records relating to the Assessor's Sales Ratio Program, working papers, calculations, maps, analyses, computations, and other component parts.

The procedure by which the Board of Supervisors acquires such information ordinarily would be by resolution reciting that the Board of Supervisors was conducting an investigation of the Assessor's office pursuant to Section 25303 of the Government Code and specifically requesting the Assessor to furnish abstracts or permit access to all records in his office.

In the present situation, the Board of Supervisors has not, by resolution or otherwise, specifically requested these

* Govt. Code § 25303 provides:

"The board of supervisors shall supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county, and particularly those charged with the assessing, collecting, safekeeping, management, or disbursement of the public revenues. It shall see that they faithfully perform their duties, direct prosecutions for delinquencies, and when necessary, require them to renew their official bond, make reports and present their books and accounts for inspection."

Honorable Joseph E. Tinney 7

January 27, 1976

records and documents, nor has it formally initiated an investigation of the Assessor's office pursuant to Section 25303 of the Government Code. Therefore, at the present time, Revenue and Taxation Code Section 408(c) has no application.

Very truly yours,

JJD

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-13

February 6, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Legislation Providing Bonus Points to San Francisco
Contractors

Dear Mr. Boreman:

This is in response to your letter dated January 13, 1976, wherein the Governmental Services Committee requested this office to prepare legislation to provide that when awarding contracts the City and County give bonus points to firms whose home offices are in San Francisco.

The Governmental Services Committee's desire to give bonus points to local firms whose home offices are in San Francisco will require a Charter amendment rather than an ordinance.

The portion of Section 7.204 of the City Charter most applicable to the problem raised provides as follows:

"The board of supervisors shall have full power and authority to enact all necessary ordinances to carry out the terms of this section and may by ordinance provide that any contract for any public work or improvement, or for the purchase of materials which are to be manufactured, fabricated or assembled for any public work or improvement, a preference in price not to exceed ten percent shall be allowed in favor of such materials as are to be manufactured,

Mr. Gilbert H. Boreman

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February 6, 1976

fabricated or assembled within the City and County of San Francisco as against similar materials which may be manufactured, fabricated or assembled outside thereof. When any such materials are to be fabricated, assembled or manufactured by any sub-contractor or materialman for the purpose of supplying the same to any contractor bidding on or performing any contract for any public work or improvement, said sub-contractor or materialman manufacturing, fabricating, assembling or furnishing said materials manufactured, assembled or fabricated within the City and County of San Francisco shall be entitled to the same preferential as would any original contractor or materialman furnishing the same if the board of supervisors by ordinance so provide. When any ordinance shall so provide any officer, board or commission letting any contract may in determining the lowest responsible bidder for the doing or performing of any public work or improvement add to said bid or sub-bid an amount sufficient not exceeding ten per cent in order to give preference to materials manufactured, fabricated or assembled within the City and County of San Francisco."

In a previous opinion, No. 62-32, dated June 25, 1962, I stated:

"Chapters 6 and 21 of the San Francisco Administrative Code deal respectively with contract and purchasing procedures and provide that all the terms and provisions of Section 98 of the Charter be made a part of all contracts entered into pursuant to those chapters. (See Sections 6.33 and 21.26.) The above-quoted portion of Section 98, however, does not allow local preferences in a final sense but merely leaves it to the Board of Supervisors to legislate the allowance of such preferences 'not to exceed ten per cent' if it so desires. While Sections 6.33 and 21.26 of said Administrative Code are unquestionably mandatory as to the positive provisions of Section 98 of the Charter, namely, those pertaining to working requirements, they are not

Mr. Gilbert H. Boreman

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February 6, 1976

definitive enough to include the yet unexercised discretion vested in the Board of Supervisors regarding the allowance of price preferences.

"It will, therefore, take additional action by ordinance on the part of the Board of Supervisors, if it deems the same necessary and advisable, to empower the city officials contracting on its behalf to exercise award preferences percentage-wise in favor of local contractors or bidders within the discretionary limits imposed by Section 98. The validity of such legislation depends upon the showing of a reasonable basis for awarding the preference to local contractors or bidders as against other contractors or bidders. (See Schrey v. Allison Steel Manufacturing Co., 255 Pac. 2d 604, where a five per cent preference law of Arizona in favor of state and local tax-paying contractors was upheld as constitutional.)"

It should be noted that Section 98, referred to supra, has now been changed to 7.204 of the Charter. Said Section gives the Board powers to grant a preference in price not to exceed ten percent (10%) to bidders, on goods manufactured, assembled or fabricated in the City and County. However, it is silent as to the allowing of bonus points to local contractors with home offices in San Francisco.

In accordance with the foregoing, you are therefore advised that, in my opinion, local preference legislation, an ordinance, not to exceed ten percent may be enacted by the Board of Supervisors in accordance with the provisions of Charter Section 7.204, if deemed advisable, but extension to bonus point preference to all local contractors with home offices in San Francisco can only be done by a Charter amendment.

Very truly yours,

REA

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-14

February 20, 1976

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Mr. Wallace Wortman
Director of Property
Real Estate Department
450 McAllister Street
San Francisco, California 94102

Subject: Surplus Property
Installment Basis

Dear Mr. Wortman:

You have asked that I investigate and report on the possibility of the City selling various surplus properties on an installment basis.

Section 7.401 of the Charter of the City and County of San Francisco grants to the department responsible for the administration of real property the power to arrange for the sale of such property with the approval of the Board of Supervisors. The Charter places no limitations on the type of sales arrangement which can be approved by the Board of Supervisors.

Furthermore, Section 25522 of the California Government Code permits counties to sell real property on an installment basis:

"The sale may be made for cash, or for part cash and upon such terms of deferred payments secured by purchase money, mortgage, or deed of trust as are determined by the action of the board of supervisors."

Mr. Wallace Wortman

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February 20, 1976

California Constitution, Article 11, Section 6 grants to municipal corporations the power to regulate all municipal affairs. In light of Charter Section 7.401 and Government Code Section 25522, the sale of surplus real property on an installment basis, subject to the approval of the Board of Supervisors, is a proper exercise of municipal authority.

Very truly yours,

JLL

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-15

February 24, 1976

MAR 13 1978

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Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Salary Standardization Ordinance;
Extension of Time for Enactment Thereof

Dear Mr. Boreman:

This is in response to your letter of February 6, 1976, wherein you advise that the Legislative and Personnel Committee has requested an opinion as to what, if any, action the Board of Supervisors could take to extend the deadline of April 1, mandated by Charter section 8.401, for fixing the salaries of miscellaneous employees for the fiscal year 1976-1977.

Section 8.400 of the Charter provides, in part, that the Board of Supervisors shall have the power and the duty to fix by ordinance from time to time, as provided in section 8.401, the salaries of the miscellaneous officers and employees of the City and County.

Section 8.401 of the Charter, referred to in section 8.400, provides, in part, that not later than January 15, 1944, and every five years thereafter and more often if in the judgment of the Civil Service Commission or the Board of Supervisors economic conditions have changed to the extent that a revision of existing schedules of compensations may be warranted to reflect the then current prevailing conditions, the Civil Service Commission shall

Gilbert H. Boreman, Clerk

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February 24, 1976

prepare and submit to the Board of Supervisors a proposed schedule of compensations which are in accord with the general prevailing rates of wages for like service and working conditions in private employment or in other comparable governmental organizations in the State of California. The Board of Supervisors may then approve or reject the schedule of compensations proposed by the Civil Service Commission. The Board of Supervisors may also amend the schedule of compensations subject to certain conditions not pertinent herein. If the Board of Supervisors adopts a schedule of compensations on or before April 1 of any year, said schedule shall become effective on July 1 of that same year; if the Board adopts a schedule of compensations after April 1 of any year, said schedule shall become effective on July 1 of the next succeeding year.

As you will see from the foregoing, neither section 8.400 nor 8.401 of the Charter contains a mandate that the Board of Supervisors adopt a schedule of compensations (the so-called salary standardization ordinance) on or before April 1, 1976. With respect to the proposed salary standardization ordinance now under consideration by the Legislative and Personnel Committee, these sections merely provide that if the Board of Supervisors adopts said ordinance on or before April 1, 1976, those employees covered by section 8.401 of the Charter shall be paid in accordance with such ordinance commencing July 1, 1976, but that if the Board of Supervisors adopts said ordinance after April 1, 1976, said employees will continue to be paid in accordance with the schedules of compensation adopted in 1975 until July 1, 1977.

Accordingly, it is my opinion that if the Board of Supervisors desires to adopt a revised schedule of compensations for miscellaneous employees to become effective on July 1, 1976, the salary standardization ordinance now in committee must be passed on or before April 1, 1976, and there is nothing the Board of Supervisors can do to extend this time beyond April 1, 1976.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-16

February 25, 1976

MAR 13 1978

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Thomas C. Scanlon, Treasurer
110 City Hall
San Francisco, California 94102

Subject: Exemption of Treasurer's List of Names
of Registered Bond Owners from
Inspection and Copying under Public
Records Act

Dear Mr. Scanlon:

This is in response to your February 2, 1976, letter requesting my opinion as to whether the list of registered bond holders of the General Obligation Bonds of the City and County of San Francisco, on file in your office, are public records available for public inspection under the provisions of the Public Records Act, sections 6250-6260 of the Government Code of the State of California.

All General Obligation Bonds of the City and County of San Francisco are issued in bearer form and, as pointed out in your letter, in the hands of the holder of the bearer bonds, they are part of his personal assets and are privileged and confidential to him. When they are registered, this is purely for the purposes of safety of the bonds from loss or theft or the more timely delivery of interest earnings and not for the purpose of making the names of the owners of the bonds a matter of public record. It further appears that if bearer bond owners feel that the registration of their bonds would result in this part of their private personal or business assets being opened to public inspection and copying, it could have an adverse effect on the free marketability of the City and County of San Francisco's bearer bonds.

Thomas C. Scanlon, Treasurer

2

February 25, 1976

You state that you have been treating the registered bond list as confidential under the provisions of sections 6254(c) and 6255 of the Public Records Act. Section 6252(d) of the Act defines a public record as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Sections 6254(c) and 6255 read as follows:

"§6254. Records exempt from disclosure requirements

"(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy; . . . "

"§6255. Withholding records from inspection: Justification: Public interest

"The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

It may first be observed that it is questionable that the list maintained by you containing the names of the registered bond holders is a "writing containing information relating to the conduct of the public's business" within the meaning of these terms as used in the Public Records Act as the list is not maintained for public purposes but purely for the benefit of the private purposes of the holders of the City and County of San Francisco's bearer bonds. However, assuming arguendo that this list is a public record, it is my opinion for the reasons above set forth that you are legally justified in treating these lists as confidential and not available for public inspection under the exemption provisions of both sections 6254(c) and 6255 of the Public Records Act above quoted.

Very truly yours,

tjb

THOMAS M. O'CONNOR
City Attorney

SF
247
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6-17

SF City Attorney

Letter Opinion No. 76-17

February 26, 1976

MAR 13 1978

Honorable John L. Molinari
Board of Supervisors
235 City Hall
San Francisco, California 94102

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Subject: Unruh Civil Rights Act as Protecting
against Discrimination because of Age

Dear Supervisor Molinari:

This is in response to your recent request for an opinion of this office concerning the enforcement of California Civil Code sections 51 and 52. Your specific question is whether these two sections govern discrimination or the protection against discrimination on the basis of age.

Sections 51 and 52, known as the Unruh Civil Rights Act, are quoted in full as follows:

"§ 51. [Citation of section: Civil rights of persons in business establishments]"

"This section shall be known, and may be cited, as the Unruh Civil Rights Act.

"All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Honorable John L. Molinari

2

February 26, 1976

"This section shall not be construed to confer any right or privilege on a person which is conditioned or limited by law or which is applicable alike to persons of every sex, color, race, religion, ancestry, or national origin."

"§ 52. [Denial, discrimination, etc., contrary to § 51: Liability in damages]

"Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of sex, color, race, religion, ancestry, or national origin contrary to the provisions of Section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars (\$250) in addition thereto, suffered by any person denied the rights provided in Section 51 of this code."

The Unruh Civil Rights Act prohibits discrimination in business establishments on the basis of sex, race, color, religion, ancestry or national origin, but discrimination based on other grounds is not specifically prohibited. The State Supreme Court in In Re Cox, 3 Cal.(3) 205, reviewed the pre-Unruh Act decisions on discrimination and the legislative history of the Unruh Act and concluded that "that statute, although primarily invoked in recent years to prohibit racial discrimination, does not limit itself to racial discrimination; both its history and its language disclose a clear and large design to interdict all arbitrary discrimination by a business enterprise. That the Act specifies particular kinds of discrimination---color, race, religion, ancestry, and national origin---serves as illustrative, rather than restrictive, indicia of the type of conduct condemned."

In view of In Re Cox, supra, it is my opinion that arbitrary discrimination because of age would be prohibited by the Unruh Civil Rights Act. It should be noted that a classification based upon age would not in all cases be an arbitrary classification. Those seeking redress under the Unruh Act would have to allege and prove that any discrimination based upon age is not only discriminatory but arbitrary and unreasonable. (Flowers v. John Burnham & Co., 21 Cal.App.(3) 700)

Very truly yours,

TAT

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-18

February 26, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Appropriateness of Procedures
Utilized to Obtain Expenditures
for Overtime of Fire Department
Uniformed Personnel

Dear Mr. Boreman:

This is in response to your request for my opinion as to the legality of the Fire Department incurring overtime obligations without first having determined from the Controller that sufficient unencumbered funds are available to meet said obligation.

I am attaching a copy of Letter Opinion No. 75-112 addressed to Mr. Morris Bernstein, President of the San Francisco Fire Commission, dated October 10, 1975, which answers the question you raise.

In summary, the letter to Mr. Bernstein concluded, inter alia, that Charter Section 6.302 prohibits an officer, employee, board or commission from incurring an obligation for the expenditure of money without first being notified by the Controller that there is a valid appropriation from which the expenditure can be made and that there are sufficient unencumbered funds in the treasury to meet said obligation.

Mr. Gilbert H. Boreman

2

February 26, 1976

However, it was further stated that during the period of time in which a memorandum of understanding was in effect which covered manning and concomitant overtime payments, the decision in Glendale City Employees Assn., et al. v. City of Glendale (1975) 15 Cal.3d 328 was applicable. That decision reasons that the approval of the memorandum of understanding by the legislative body is the "legislative act," i.e., the discretionary determination to maintain manpower at a certain level and pay the necessary overtime to do so. Obtaining the money to pay the overtime was designated a ministerial act and therefore subject to relief by writ of mandate if the legislative body subsequently refused to make the payments.

The Glendale case, however, relies on the existence of a valid memorandum of understanding. As you are aware, the Board of Supervisors effectively rescinded the memorandum which deals with manning and overtime payments on November 24, 1975.

It is my opinion that during the existence of the memorandum of understanding and until the aforementioned rescission date, officers of the Fire Department could incur the monetary obligation to pay overtime to uniformed personnel without first complying with the provisions of Charter Section 6.302. When the Board of Supervisors first approved the memorandum, implicit therein was the understanding that such funds would be made available.

However, after the rescission date, the rationale in Glendale is no longer applicable and, in my opinion, the Chief and the Fire Commission must fully comply with the provisions of Charter Section 6.302 before incurring monetary obligations for the payment of overtime.

Very truly yours,

MCK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-18-A

February 26, 1976

MAR 13 1978

Hon. John J. Barbagelata
Board of Supervisors
235 City Hall
San Francisco, Calif.

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Subject: Sec. 16.98 of the Administrative Code -
One Year Residency Requirements for
Job Applicants

Dear Supervisor Barbagelata:

This office has reviewed your letter of January 16, 1976 in which you pose various questions regarding Section 16.98 of the Administrative Code. That section provides:

Except as otherwise provided in the charter, the residence requirements for applicants for appointment to offices and employments shall be as follows:

(a) Applicants for entrance positions in the uniformed forces of the police and fire departments shall have been residents of San Francisco for the one year period immediately prior to the last date for receipt of applications.

(b) For all other offices and employments residence requirements shall be as follows:

(1) General provisions. Applicants for entrance positions must have been residents of San Francisco for the one year period immediately prior to the last date for receipt of applications, if the position is subject to civil service examination, or the date of application if the position is exempt from civil service examination. This requirement may be waived or modified to current residence in San Francisco if the civil service commission finds that such waiver or modification is necessary to attract a sufficient

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number of qualified applicants based on current or prior experience in recruitment. Such waiver or modification may also be made with respect to positions not subject to civil service examination upon application of the appointing officer to the civil service commission.

(2) Specially funded programs. The residence requirements for specially funded program applicants where the funding agency sets special residence requirements shall be subject to the approval of the civil service commission.

(3) Exceptions. San Francisco residence shall not be required for promotional examinations; entrance examinations in those cases wherein the applicant is an employee of the city and county meeting legal residence requirements applicable to employees; positions outside of the city and county; positions requiring a four-year college or university degree or professional registration or licensing in engineering, medicine, nursing, probation, or other field, except in those cases where the civil service commission anticipates on the basis of past experience that a sufficient number of qualified applications will be received from residents of San Francisco; and those examinations for which the filing period must be extended beyond three weeks for the express purpose of recruiting a sufficient number of qualified applicants.

Section 16.98 generally imposes a one-year residency requirement on applicants for city employment. Your questions and responses to them follow:

(1) Has Section 16.98 ever been challenged in court?

In the case of Diem v. San Francisco Civil Service Commission Superior Court No. 655986 the plaintiff, an experienced firefighter challenged the requirement in effect in 1973 contained in Section 16.98(a)(2) that applicants for entrance

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into the uniformed force of the fire department reside for three or more years within thirty (30) air miles of City Hall. Pursuant to that requirement the Civil Service Commission had refused to allow the plaintiff to take the oral examination for the position of fireman. In its decision issued on July 27, 1973, the court concluded that the three-year durational residency requirement inhibited the exercise of the right to travel and could not be justified by any compelling state interest.

Subsequently the Board of Supervisors amended Section 16.98 of the Administrative Code and it now imposes a one-year residency requirement as a condition for applicants for city employment.

The ruling in the Diem case is not applicable to the present one-year requirement for several reasons:

The Diem case was neither a taxpayers suit nor a class action and can be deemed binding only on the facts presented in that case.

The three-year durational requirement reviewed in the Diem case was repealed by the Board on October 15, 1973. Subsequently the Board, on February 4, 1974 amended Section 16.98 to its present form. The law on the validity of durational residency requirements, in a state of flux since 1969, must be reviewed and the reasoning advanced in Diem evaluated in terms of recent decisions in the area.

The one-year residency requirement is an appropriate affirmative action method of correcting racial imbalance found by a federal court to exist in the Fire Department. This matter was specifically discussed in an opinion issued by this office on January 26, 1976 addressed to Bernard Orsi, Director of Personnel, Civil Service Commission, holding valid the one-year residence requirement as applied to applicants for the position of fire fighter.

It must be concluded that though a certain provision of an earlier and different form of Section 16.98 was successfully challenged, the decision in that case is not material insofar as Section 16.98 presently reads.

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(2) If it has not been challenged, would it not still be in effect?

This question essentially asks whether the legal analysis followed in Diem compels the conclusion that the one-year residency requirement of Section 16.98 is unconstitutional.

In the Diem case the court concluded in relevant part:

1. The three-year durational residency requirement inhibits the exercise of the right to travel.

2. The three-year durational residency requirement not supported by any compelling state interest which overrides petitioner's right to travel.

3. Any legitimate purpose which respondent seeks to promote by its three-year durational residency requirement may be promoted by alternative means less subversive of the fundamental right to travel.

4. Accordingly, the three-year durational residency requirement violates the Fourteenth Amendment to the United States Constitution; it is an unconstitutional condition of public employment; it is void and a nullity.

The leading case involving the right to travel is Shapiro v. Thompson 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). In that case the court held unconstitutional a one-year residency requirement as a condition for entitlement to welfare adopted specifically to discourage interstate migration for the purpose of obtaining better welfare benefits. The court ruled that any legislation adopted to discourage the exercise of the fundamental right to travel freely between the states could only be justified if it served a compelling public interest which could not be advanced by any other many less disruptive of the fundamental right involved.

The court viewed the facts in Shapiro as special and narrowly limited its ruling by stating in Footnote 21:

"We imply no view of the validity of waiting-period or residence requirements determining eligibility

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to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the constitutional right of interstate travel."

Subsequently, cases following Shapiro invalidated various residency requirements. See Dunn v. Blumstein 405 U.S.330, 92 S.Ct. 995 L.Ed.2d 274 (1972) (invalidating a one-year residency requirement for voter registration); Zeilenga v. Nelson 4 C.3d 716,721 (1971) (holding invalid a five-year residency requirement as a condition for seeking local office). See also Camera v. Mellon 4 C.3d 714 (1971); Thompson v. Mellon 9 C.3d 96 (1973) and Johnson v. Hamilton 15 C.3d 461 125 Cal.Rptr. 129 (1975) (holding invalid various, less restrictive durational residency requirements as a condition for seeking local public office).

In Starns v. Malkerson 326 F.Supp 234 (1970) (D.C. Minn.) the trial court upheld a one-year durational residency requirement as a condition for qualifying for resident student tuition. This decision was affirmed by the United States Supreme Court at 401 U.S. 985, 91 S.Ct. 1231, 28 L.Ed.2d 527 (1971). See also Kirk v. Board of Regents of Univ. of California 273 Cal. App.2d 430, 78 Cal.Rptr. 260 (1969) appeal dismissed for want of a substantial federal question 396 U.S. 554, 90 S.Ct. 754 24 L.Ed.2d 754 (1960) upholding a similar resident tuition requirement in California. Recently in Sosa v. Iowa 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) the court discussed its prior ruling involving the right to travel. The court said at pages 560-561 of 95 S.Ct.:

"State statutes imposing durational residency requirements were of course invalidated when imposed by States as a qualification for welfare payments, Shapiro, supra, for voting, Dunn, supra, and for medical care, Maricopa County, supra. But none of those cases intimated that the States might never impose durational residency requirements, and such a proposition was in fact expressly disclaimed. What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or record-keeping considerations which were held insufficient to outweigh the

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constitutional claims of the individuals. But Iowa's divorce residency requirement is of a different stripe. Appellant was not irretrievably foreclosed from obtaining some part of what she sought, as was the case with the welfare recipients in Shapiro, the voters in Dunn, or the indigent patient in Maricopa County. She would eventually qualify for the same sort of adjudication which she demanded virtually upon her arrival in the State. Iowa's requirement delayed her access to the courts, but, by fulfilling it, a plaintiff could ultimately obtain the same opportunity for adjudication which she asserts ought to be hers at an earlier point of time." (footnote omitted)

Similarly in the instant case the durational residency requirements are not justified merely on the basis of budgetary or record-keeping considerations (see discussion below) nor is a recently arrived resident irretrievably foreclosed from obtaining municipal employment.

In Adams v. Superior Court 2 C.3d 55 115 Cal.Rptr. 247 524 P.2d 375 (1974) the court reviewed the contention that Section 198 CCP unconstitutionally imposed a one-year durational residency requirement on prospective jurors. At pp. 61-62 the court said:

"It is also argued that the durational residency requirement for jurors impermissibly restricts an individual's right to travel. The Supreme Court cases holding a classification unconstitutional because it impinges on the right to travel involve regulations denying very substantial rights or needs to short term residents. (Shapiro v. Thompson, supra, 394 U.S. 618 (funds necessary for subsistence); Dunn v. Blumstein, supra, 405 U.S. 330 (right to vote); Memorial Hospital v. City of Maricopa (1974) 415 U.S. 250 [39 L.Ed.2d 306, 94 S.Ct. 1076] (medical care).) In these cases the court has examined two factors: (1) whether the residency requirement would deter migration; and (2) the extent to which the waiting period served to penalize a person for exercising the right to travel. (Memorial Hospital v. County of Maricopa, supra, 415 U.S. at pp. 256-262 [39 L.Ed.2d at pp. 314-317].)"

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"There is neither evidence nor reason to believe that one year's exclusion from jury duty is a factor materially affecting a person's decision to migrate, and any penalizing effect of the durational residency requirement is inconsequential. Thus, the requirement has insufficient effect on the right to travel to compel strict judicial scrutiny."

"The strict test being inapplicable, the residency requirement for jurors must be upheld if there is any rational relationship between the requirement and some legitimate state objective. The Legislature is presumed to have acted constitutionally, and statutory classifications may be set aside only if no ground can be conceived to justify them, and they are wholly irrelevant to the achievement of the state's objective. (*McDonald v. Board of Election* (1969) 394 U.S. 802, 809 [22 L.Ed.2d 739, 745-746, 89 S.Ct. 1404]; *McGowan v. Maryland* (1961) 366 U.S. 420, 425-426 [6 L.Ed.2d 393, 398-399, 81 S.Ct. 1101].)"

It is submitted that the one-year requirement of Section 16.98 would not deter migration and any penalizing effect on the right to travel is inconsequential.

In the recent case of *Ector v. City of Torrance* 10 C.3d 129, 109 Cal.Rptr. 849 514 P.2d 433 (1973) cert denied 415 U.S. 935, 94 S.Ct. 1451 39 L.Ed.2d 493 the California Supreme Court upheld a current residency requirement for city employees. The City and County of San Francisco appeared as *amicus curiae* advancing many justifications for a residency requirement. Noting the justifications presented by the City and County the court said:

"Among the governmental purposes cited in these decisions or now urged by *amici curiae* are the promotion of ethnic balance in the community; reduction in high unemployment rates of inner-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress;

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diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. We cannot say that one or more of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue. "

Many if not all these purposes are also served by a durational requirement. For these reasons it must be concluded that the one-year durational residency requirement for city employment is reasonable and therefore within the discretion of the Board to adopt.

(3) Is there specific language in Proposition 5 prohibiting local government from requiring residency for applicants to city employment?

Proposition 5 adopted by the voters on November 5, 1974, amended the state constitution by adding Section 10.5 to Article 11. That section provides:

"A city or county, including any chartered city or chartered county, or public district, may not require that its employees be residents of such city, county, or district; except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location. "

By its terms Section 10.5 refers specifically and only to "employees" of a "city or county". The constitutional amendment does not refer to applicants or to persons seeking to file applications for employment. Courts are bound to give effect to statutes according to the usual and ordinary import of the language employed in framing them. Chavez v. Sergeant 52 Cal.2d 162, 203 339 P.2d 801 (1959). Benson v. Superior Court 214 Cal. App.2d 551, 558 29 Cal.Rptr. 760 (1963).

In Webster's Third New International Dictionary the word "employee" is first defined as:

"one employed by another usually in a position below the executive level and usually for wages. "

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There is no suggestion either from the language of Section 10.5 or from the commonly accepted meaning of the word "employee" that it embraces job applicants. Words in a statute are to be given their common meaning. Allyne v. Murasky 200 Cal.661 254 P.564 (1927); In re Quinn 35 Cal. App.3d 473 110 Cal.Rptr. 881 (1973). And when common terms are used in statutes they should be given their common meaning. Corbett v. State Board of Control 188 Cal.289 204 P.823 (1922).

The rationale for the rule that the common meaning of statutory language be followed was articulated by Mr. Justice Frankfurter in Addison v. Holly Hill Fruit Products Inc. 322 U.S. 607, 618 64 S.Ct. 1215, 1211 88 L.Ed. 1488, 1496, 1476 (1944) when he said:

"Legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

These policies are particularly relevant when the word is part of a constitutional amendment placed before the people and adopted by them as a ballot proposition.

It is submitted that the statutory and commonly accepted definition of the word employee is clear and generally recognized in California. The language of Section 10.5 must be taken in its literal sense. It must be presumed that the electorate in adopting the proposition gave the language of the constitutional provision its literal, commonly accepted meaning and there is no basis for concluding that explanatory language must be consulted to impeach the plain, unambiguous and commonly understood meaning of the word "employee".

It may be contended that the ballot arguments submitted by the proponents of Proposition 5 justify the conclusion that the word "employee" was intended to include applicants. One of these arguments suggested that a yes vote on Proposition Five would eliminate residency requirements which limited the number and quality of applicants for charter city and county employment.--

Whereas arguments to voters appearing on the ballot at

1/ Section 16.98(b)(1) specifically empowers the Civil Service Commission to waive or modify the one-year requirement where necessary to attract a sufficient number of qualified applicants.

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the time of the constitutional amendment may be consulted in aid of the construction of doubtful language.

" . . . such aids to the interpretation of a written document while available to the courts are not at all to be considered as controlling, since whatever may have been the intent of the proponents of a particular change in a law must at the last analysis be derived from the language of the proposed enactment purporting to effect such change".
(citations omitted)

McGuire v. Wentworth 120 Cal.App.340,344 7P.2d 729 (1932). See also California Institute of Technology v. Johnson 55 C.A.2d 856 132 P.2d 61 (1942). Where the meaning of a statute is plain and its language is clear and unambiguous, its literal terms must be followed In re Mitchell 120 Cal.384 52 P. 797 (1898) and the function of legislative history is to solve but not to create an ambiguity and may not be taken as giving to a statute a meaning not fairly within its words C.I.R. v. Bilder 289 F.2d 291 (1961).

The strictest adherence to these principles is called for when the meaning of language in a ballot proposition adopted in a general vote of the people has been placed in question. Though legislators, judges, attorneys, and semanticists, may be alert to and versed in sophisticated and recondite meanings to be given to the word "employee" and though the term "employee" has no fixed meaning that must control in every instance, Knight v. Bd. of Employees Retirement 32 Cal.2d 400,402 196 P.2d 547 (1948) in some instances even being held to include job applicants, Laeng v. WCAB 6 C.3d 771, 494 P.2d 1, 100 Cal. Rptr. 377 (1972) (extending worker's compensation benefits to an applicant injured while taking an agility test), John Hancock Mut. Life Ins. Co. v. National Labor Rel. Bd. 191 F.2d 483 (1971) (concluding that the Labor Relations Acts definition of the term "employee" includes not only existing employees of employers but also in a general sense, members of the working class and was sufficient to include an applicant for employment), nevertheless in California the word "employee" refers to a

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person working for another, subject to the order, control and discretion of the latter and liable to discharge for disobedience. Key Ins. Exchange v. Washington 7 C.A.3d 209 86 Cal.Rptr. 542 (1970). The relationship between the employer and employee and the control and direction of the former over the latter is essential to the California definition of the term "employee". Gibson v. David Realty Co. 30 Cal. Rptr. 253,261; 215 Cal.App.2d 190,205 (1963). See also labor code Section 3351 which in part sets forth a general definition of the term "employee" as:

"every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:"

In light of the clear, well accepted meaning of the word "employee" there is no justification for expanding the meaning of the word beyond its commonly accepted meaning.

(4) Is it your opinion that the City is now obliged to accept applications from non residents? For instance, can a janitor in Topeka apply for a janitor's job here?

In light of the discussion set forth above the City is not obliged to accept applications for employment from non residents.

(5) Assuming one were interested in seeing the one-year residence requirement retained, is there any additional legislation needed to accomplish this?

Since Section 16.98 already imposes a general, one-year on residency requirements on applications for City employment, no additional legislation is needed to accomplish this stated purpose.

Very truly yours,

BED

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-19

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Honorable Quentin L. Kopp
President
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Legality of Legislation Providing that Lending
Institutions Remit to the City and County of
San Francisco on a Monthly Basis the Amount of
Money in an Impound Account Covering Real Property
Taxes

Dear Supervisor Kopp:

This opinion is in response to your inquiry as to whether the Board of Supervisors can legally enact an ordinance requiring lending institutions to remit to the City and County of San Francisco on a monthly basis money for real property taxes collected monthly in "impound accounts".*

The proposed legislation, in my opinion, would be invalid for at least three reasons:

* The term "impound account" commonly is used to describe the arrangement whereby, in connection with a real estate loan secured by a mortgage or deed of trust, the lender and the borrower enter into a separate contract under which (1) the borrower agrees to remit to the lender, along with the borrower's regular monthly mortgage payment, an amount equal to 1/12th of the anticipated real estate taxes and/or 1/12th of the anticipated insurance premium, and (2) the lender

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1. The Revenue and Taxation Code, and particularly Sections 2605 through 2608 and Sections 2617 through 2619, clearly contemplates that such taxes will be paid in no more than two installments, and expressly sets forth the due dates and the delinquency dates for such payments. The proposed legislation, calling for the remittance of property taxes in monthly installments, would directly conflict with the Revenue and Taxation Code.

2. State legislation regulating lenders, and particularly Civil Code Sections 2954 and 2955 expressly authorizing at least some impound accounts "on terms mutually agreeable to the parties . . . if . . . the establishment of such an account shall not be required as a condition to the execution of the loan", constitutes a comprehensive scheme of legislation which manifestly was intended to pre-empt local regulation in the same field. The proposed legislation would infringe upon this area of exclusive State concern.

3. The case of Abrams v. Crocker-Citizens National Bank (1974) 41 C.A.3d 55 strongly suggests that some impound account contracts, depending on the particular terms and circumstances thereof, create constructive trusts, in which case the lender must account to the borrower for any profits realized by the lender from its use of the funds in the impound account. The proposed legislation would interfere with this constructive trust relationship, and would deprive the mortgage borrower of the profits generated by his remittances.

Revenue and Taxation Code Sections 2605 through 2608 provides as follows:

"§2605. Taxes due on November 1. The following taxes on the secured roll are due November 1st:

- (a) All taxes on personal property.
- (b) Half the taxes on real property, and if the amount is not evenly divisible by two, the odd cent is also due unless the roll shows the odd cent as part of the second installment.

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agrees to receive and account for such remittances and to pay the real property taxes and/or the insurance premium prior to delinquency. The lender usually claims the right to use such remittances for its own profit in the interim, but does not pay interest to the borrower for the interim use of these remittances.

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"§2606. Due date of second half of real property taxes. The second half of taxes on real property on the secured roll is due February 1st.

"§2607. Payment of entire real property tax on due date of first installment; Separate payment of second installment; Separate payment of first installment not acceptable after second installment delinquent. The entire tax on real property may be paid when the first installment is due. The second installment may be paid separately only if the first installment has been paid. Unless accompanied by the payment of the second installment, payment of the first installment shall not be accepted after the second installment has become delinquent.

"§2608. Acceptance of payment prior to due date. The tax collector may fix a date preceding the due date when payments may be made."

Revenue and Taxation Code Sections 2617 through 2619 provides as follows:

"§2617. Time of delinquency and penalty; Taxes due November 1st. All taxes due November 1st, if unpaid, are delinquent December 10th at 5 p.m., and thereafter a delinquent penalty of 6 percent attaches to them.

"§2618. Same: Second half of realty taxes. The second half of taxes on real property, if unpaid, is delinquent April 10th at 5 p.m., and thereafter a delinquent penalty of 6 percent attaches to it.

"§2619. Same: When delinquent date falls on Saturday. If December 10th or April 10th falls on Saturday, Sunday or a legal holiday, the time of delinquency is 5 p.m. on the next business day."

Under these Sections, real property taxes are payable in not more than two installments. For the first installment of real property taxes, taxes are due on November 1, except that the Tax Collector may fix an earlier date when payments may be made, and are delinquent after 5:00 p.m. on December 10. For the second installment of real property taxes, the taxes are due on February 1, except that the Tax Collector may fix an earlier date when payments may be made, and are delinquent after 5:00 p.m. on April 10.

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Proposed legislation, calling for monthly payments of these taxes, would infringe upon the statutory scheme for the payment of real property taxes embodied in the Revenue and Taxation Code.

I further call to your attention the opinion of this office (Opinion No. 73-3) dated January 5, 1973, wherein I concluded that the State had pre-empted the field of regulating lending practices of lending institutions and therefore that the City and County of San Francisco was prohibited from enacting legislation which would prohibit lending institutions from impounding real property taxes without the consent of the borrower. That opinion was based in part upon Civil Code Sections 2954 and 2955, relating expressly to "impound, trust, or other type of account for payment of taxes on the property." Although Section 2954 covers impound accounts only in connection with a deed of trust or mortgage on "a single-family, owner-occupied dwelling", the section expressly provides that:

"Nothing contained in this section shall preclude establishment of such an account on terms mutually agreeable to the parties to the loan, if . . . the establishment of such account shall not be required as a condition to the execution of the loan or sale agreement."

The manifest intention of this legislation, particularly when considered in the context of other legislation regulating the lending practices of lending institutions, is that the establishment and the terms, of impound accounts should be a matter of private contract between the borrower and the lender, except as expressly qualified by State legislation.

The legislation now proposed, like the legislation proposed in 1973 to prohibit impound accounts, would infringe upon a field pre-empted by State law.

Finally, in Abrams v. Crocker-Citizens National Bank (1974) 41 C.A.3d 55, the court ruled upon a contention of certain class action plaintiffs that monies paid to Crocker-Citizens, as lender, pursuant to an agreement for an impound account should be regarded as trust funds held by the lender upon a constructive trust for the benefit of the borrowers until such monies were required to be paid out for real property taxes. The plaintiffs' theory was

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that the lender was required to account to the borrowers for any profits made by the lender in using such impound account funds. The trial court granted summary judgment in favor of the lender, dismissing plaintiffs' class action. The Court of Appeal reversed, holding that it was a question of fact as to whether or not the funds in the impound account should be subject to a constructive trust. The matter has not yet gone to trial and remains unresolved. If it were to be determined that funds in an impound account were trust funds, so that the lender was required to account to the borrowers for any profits made through use of such monies, the proposed ordinance would directly interfere with the obligations of the lender, in his capacity as constructive trustee.

Accordingly, you are advised that the Board of Supervisors has no legal power to enact legislation requiring the monthly remittance to the City and County of San Francisco of monies held in an impound, trust, or other type of account for the payment of real property taxes.

Very truly yours,

WMB

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-20

March 8, 1976

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: San Francisco Campaign Contribution
and Expenditure Ordinance; Effect
of Buckley v. Valeo Thereon

Dear Mr. Boreman:

This is in response to your letter of February 3, 1976, wherein you request my opinion as to any effect the decision of the United States Supreme Court in Buckley v. Valeo, 96 S.Ct. 612, might have on the provisions of San Francisco's campaign spending ordinance.

In the Buckley case, the Supreme Court held that, with respect to the Federal Election Campaign Act of 1971, as amended in 1974, the provisions limiting individual contributions to campaigns are constitutional; the provisions limiting expenditures by candidates on their own behalf are unconstitutional; the provisions limiting total expenditures in various campaigns are unconstitutional, and the provisions limiting the amount which any individual could spend, independently of a candidate but relative to the candidate, are unconstitutional.

Applying the holdings of the U. S. Supreme Court in the Buckley case, supra, to our San Francisco ordinance indicates the following:

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1. The provisions limiting total contributions and total expenditures in campaigns for elective officers of the City and County (Section 16.519(b) of the San Francisco Administrative Code) or for ballot measures (Section 16.519(d) of the San Francisco Administrative Code) appear to be unconstitutional.

2. The provisions limiting expenditures by an individual not subject to the control of a candidate or a committee in support of or in opposition to a measure (Section 16.522 of the San Francisco Administrative Code) also appear to be unconstitutional. However, the provision that such individuals must file campaign statements appears to be constitutional, provided that such expenditures are related to a communication expressly advocating the election or defeat of a clearly identified candidate or measure. (96 S.Ct. 612, 664.)

3. The provisions limiting the contributions which a candidate, or his immediate family, may make to his own campaign (Section 16.519(c) of the San Francisco Administrative Code) would appear to be unconstitutional. Although the Federal law in this respect is a limitation upon "expenditures" and our ordinance is a limitation upon "contributions," the net result appears to be the same. In striking down the Federal provision the Supreme Court stated, in part, that "The First Amendment cannot tolerate [a] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." (96 S.Ct. 612, 651.)

4. The provisions limiting the contribution which an individual may make in support of or in opposition to a candidate (Section 16.519(a) of the San Francisco Administrative Code) appears to be constitutional, but the inclusion of the members of the contributor's immediate family within the limitation appears to be unconstitutional. The Federal law contains no such definition of "person" so this issue was not before the Supreme Court. However, it would appear that any provision of law which would absolutely foreclose or limit in any way the right of an individual to contribute to the candidate of his choice because some other member or members of that individual's immediate family had already contributed to the

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same candidate would amount to a denial or an abridgment of a First Amendment right.

Other than set forth hereinabove, it appears that the other provisions of the San Francisco campaign ordinance are either unaffected or constitutionally valid under the Buckley decision.

In accordance with your further request, I enclose herewith a draft of a proposed ordinance amending our campaign ordinance so as to bring it into conformity with the Buckley decision.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

March 9, 1976

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Mr. Gilbert H. Boreman
Clerk of the Board
235 City Hall
San Francisco, California 94102

Subject: Are Charter Amendments And Ordinances Subject To
Meet And Confer Requirements If They Relate To
Matters Within The Scope of Union Representation?

Dear Mr. Boreman:

This is in response to your inquiry whether the Board of Supervisors can propose charter amendments which pertain to matters claimed by employee organizations to be within the scope of their representation without first meeting and conferring with the organizations about the proposed amendments.

Yes, it can. The Constitution (Cal. Const., art. XI, §3(b)) gives the Board the power to propose charter amendments. There is no requirement that the Board meet and confer with employee organizations before determining to submit, and submitting, charter amendments to the electorate.

You make a similar inquiry respecting the Board's passage of ordinances pertaining to such matters. Gov. C. §3504.5 states that, except in cases of emergency, a governing body shall give reasonable written notice to each recognized employee organization affected of any ordinance directly relating to matters within the scope of representation proposed to be adopted by the governing body and shall give such organization the opportunity to meet with the governing body. Gov. C. §3504 provides that the scope of representation shall include all matters relating to employment

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conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.

The Board therefore is required to give recognized employee organizations reasonable written notice and opportunity to meet with it about ordinances directly relating to matters within the scope of representation which it proposes to adopt.

Very truly yours,

GEB

THOMAS M. O'CONNOR
City Attorney

10 March 1976

MAR 13 1978

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Andrew C. Casper, Chief
San Francisco Fire Department
260 Golden Gate Avenue
San Francisco, California 94102

Subject: Payment of Sick Leave and Disability Leave to Members of Fire Department Who Become Sick or Disabled Due to Injury While Assigned to Higher Rank Under "Like-Work Like-Pay Rule"

Dear Chief Casper:-

Your predecessor, Keith P. Calden, had requested my opinion as follows:

"Section No. 7 of Salary Ordinance 150-74 states:

'Assignment to Higher Ranks: All assignment of uniformed members of the Police and Fire Departments to higher ranks shall be by appointment. Provided, however, for members of the uniformed force of the Fire Department any time worked less than a full watch shall be excluded.'

(a) This is commonly referred to as the 'Like-Work Like-Pay Rule.'

(b) In many instances a man of a lower rank is required to work for only one watch. This may be for ten hours or fourteen hours depending on a starting time of either 8:00 a.m. or 6:00 p.m. Two full watches amount to a Tour of Duty of twenty-four hours.

A. C. Casper, Chief
S.F. Fire Dept.

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10 March 1976

Question: When a man is working only one full watch, in such higher rank and he becomes sick, or disabled on account of injury, is he entitled to pay at the higher rank:

- (a) If he reports off sick (non-industrial)?
- (b) If he suffers an injury in the line of duty?"

As indicated in the request for opinion, Section 7 of Salary Ordinance No. 150-74 required that all assignments to higher rank shall be by appointment. This same requirement is found in Ordinance No. 93-75, which is the salary ordinance currently in effect. As I have previously noted, a member of your department who is assigned to perform the duties of a higher rank in accordance with these provisions is entitled to receive the salary of that higher position for the time during which he is performing such duties. (City Attorney's Letter Opinion No. 71-1.) A person so assigned and paid "holds" or "occupies" that higher position. (City Attorney's Opinions No. 71-7 and 73-106.)

The request for opinion relates to the payment of two distinct types of leave: the first, sick leave, and the second, industrial disability leave.

Sick leave rights become vested upon the occurrence of the illness which disables the employee from performing his duties, and such employee is entitled to his full accumulation of sick leave so long as the disabling illness continues. The remuneration paid the incumbent during the period of his absence due to illness is not payment of the salary of the position but rather it is the payment of an employment benefit to which he is contractually entitled, measured by the salary he received at the time the leave commenced. (See: Austin v. City of Santa Monica, 234 C.A.2d 841, 845; City Attorney's Letter Opinion No. 68-85.) Consequently, when a member of your department becomes ill while assigned to perform the duties of a higher rank, and after having completed at least one full watch while so assigned, his sick leave should be paid to him predicated upon the salary of such higher rank.

A. C. Casper, Chief
S.F. Fire Dept.

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10 March 1976

Industrial disability leave is provided for and paid pursuant to the provisions of Section 8.515 of the Charter. Section 8.515 requires that a member of the Police or Fire Department who is incapacitated for the performance of his duties as the result of bodily injury received in or illness caused by the performance of duty shall be paid disability benefits equal to and in lieu of his salary while so incapacitated for a period or periods not to exceed twelve months. Where a member of your department incurs a disabling industrial injury or illness while assigned to perform the duties of a higher rank and while receiving the salary of that higher rank, he is entitled to receive disability benefits pursuant to Section 8.515 predicated upon the salary of such higher rank. The entitlement to receive disability benefits based upon such higher salary continues during the period of disability (but not to exceed twelve months) even though the member because of his disability, is no longer assigned to perform the duties of such higher rank. (City Attorney's Opinion No. 73-106.)

You are advised accordingly.

Very truly yours,

DJG

THOMAS M. O'CONNOR
City Attorney

SF
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6-23

SF City Attorney

Letter Opinion No. 76-23

March 17, 1976

MAR 13 1978

DOCUMENTS DEPT.
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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California

Subject: Legality of a System of Preferential
Parking

Dear Mr. Boreman:

You have inquired on behalf of Supervisor Terry Francois as to the legality of a system of preferential parking in San Francisco. The Director of Planning, in addition to requesting an opinion on the subject generally, also enclosed with his letter the outline of a preferential parking plan for review and comment. However, I feel it most appropriate in this letter opinion to address only the limited questions of the constitutionality and general legality of preferential parking. The appropriateness of a particular plan should be evaluated by the Board of Supervisors and the Department of City Planning with consideration for the principles set forth in this opinion.

The subject of preferential parking has been indirectly commented upon by this office in the past. However, the subject was directly addressed in Letter Opinion No. 73-107, dated August 21, 1973, a copy of which is attached. In that opinion, based upon the then applicable legal authority, it was concluded that any system of preferential parking would be subjected to a strict standard of judicial review pursuant to Shapiro v. Thompson, 394 U.S. 618 (1969). Under such rigid scrutiny, preferential parking would have been in all probability invalidated.

Since that opinion was written in 1973, however, a number of decisions of the United States Supreme Court, lower

Mr. Gilbert H. Boreman

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March 17, 1976

federal courts, and the California Supreme Court have been handed down. These decisions have further defined the substance of and the limits to the constitutional "right to travel" as discussed in Shapiro. The result has been a narrowing of the scope of the right to travel, limiting its application in a fashion that now permits me to conclude that strict judicial scrutiny of a preferential parking plan is no longer called for. Instead, the "discrimination" inherent in a preferential parking scheme would be upheld in court so long as it was in some way rationally related to the general public welfare of the residents of the City and County.

Based on my understanding of several of the justifications for preferential parking in San Francisco, I am of the opinion that there exists a number of rational bases which would support such a regulatory system. Implementation of preferential parking would be both constitutional and within the general powers of the Board of Supervisors.

PREFERENTIAL PARKING DEFINED

The domain of regulation of the use of the public ways has been preempted by the state as a matter of statewide concern. However, extensive parking regulatory authority has been delegated by the Legislature to local agencies and municipalities. Thus, Vehicle Code Section 22507 provides that:

"Local authorities may by ordinance or resolution prohibit or restrict the parking or standing of vehicles on certain streets or highways, or portions thereof, during all or certain hours of the day. With the exception of alleys, no ordinance or resolution shall apply until signs or markings giving adequate notice thereof have been placed."

Additional Vehicle Code sections authorize regulation of parking between 2:00 a.m. and 6:00 a.m. (Section 22507.5) or the creation of parking meter districts (Section 22508).

"Preferential parking" is a concept implying the regulation of parking to the advantage of a particular class of motor vehicle operators. Thus, pursuant to the above cited authority, the Board of Supervisors has created white and yellow parking zones, special commercial meter zones in congested business areas, permit parking in reserved slots adjacent to City Hall, and other

Mr. Gilbert H. Boreman

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March 17, 1976

similar preferential parking systems. A classification in each case is made permitting a certain class of vehicle operators to park without being subjected to sanction. These classifications are "economic" or "social" in the broad sense, and have been upheld as rationally related to the general public welfare interest. See Hirsh v. Oklahoma City, 234 P.2d 925 (Oklahoma 1951) [yellow zone]; City of Akron v. Davies, 170 N.E.2d 494 (Ohio 1959) [city employees parking near City Hall].

The question posed herein relates to whether certain parking privileges may be granted to residents of a district who lack sufficient off-street parking. The resident would be able to park in the vicinity of his home without restriction while other non-residents would be subject to various time limits on parking. Frequently such districts would be appropriate adjacent to a parking "attractor" such as a major hospital, educational institution or mass transit facility. Other city areas attractive to all-day commuter parking have been on occasion singled out as meriting preferential parking treatment. The justification for the creation of such a parking privilege is especially evident in San Francisco, with its huge imbalance between the number of resident-owned automobiles and off-street parking places.

II

EVOLUTION OF THE RIGHT TO TRAVEL

The right to travel received its most popular formulation in Shapiro v. Thompson, 394 U.S. 618 (1969), though its genesis can be seen in several earlier decisions of the Supreme Court involving such topics as international movement (Kent v. Dulles, 375 U.S. 116 (1958)) and interstate travel (United States v. Guest, 383 U.S. 745 (1966)). In Shapiro, a durational residency requirement limiting access to welfare payments was strictly scrutinized by the court. It held that the Constitution created a right to travel upon which the residency requirement infringed. Coupled with this infringement was a delay of access for many indigent travelers to the very means of survival via welfare benefits. The court held that the utility of the residency requirement was outweighed by the constitutional infringement created thereby and noted, as well, that less constitutionally offensive alternatives existed that would serve the state interests equally as well. Therefore, the residency requirement was invalidated.

Mr. Gilbert H. Boreman

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March 17, 1976

Since Letter Opinion No. 73-107 was written, a number of decisions have further illuminated the Shapiro rationale. Such decisions as Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) [durational residency for indigent medical care] and Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) [zoning restrictions on single-family dwellings] have demonstrated that strict scrutiny is called for only when migration is penalized by government action. Mere "movement" cannot be equated with the right to travel, nor does some inconvenience amount to a "penalty" in the constitutional sense.

These principles were clearly at work in the California Supreme Court decision of Ector v. City of Torrance, 10 Cal.3d 129 (1973), cert. denied 415 U.S. 935 (1974). Ector involved a Torrance ordinance requiring city employees to reside within city limits. The court rejected the argument that the right to travel was the same as the "right to commute" claimed by a city employee. The court further held that the incidental regulation of employee residence did not amount to a "penalty" as contemplated by Shapiro. This same analysis of employee residency restrictions in light of Shapiro was also adopted in Wright v. City of Jackson, Mississippi, 506 F.2d 900 (5th Cir. 1975) and Abrahams v. Civil Service Commission, 65 N.J. 61, 319 A.2d 483 (1974). By dismissing an appeal for want of a substantial federal question, the United States Supreme Court "affirmed" a similar ruling in Detroit Police Officers Assn. v. City of Detroit, 385 Mich. 519, 190 N.W.2d 97 (1971), app. dism. 405 U.S. 950.

This "penalty" analysis was further developed by the California Supreme Court in Adams v. Superior Court, 12 Cal.3d 55 (1974). Adams involved a challenge by a criminal defendant to a one-year residency requirement for jury service. The court concluded that travel was not significantly deterred, nor did the waiting period penalize any constitutional right. Therefore, the court reviewed the requirement under the rational basis standard and upheld it. See also Construction Industry etc. v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975) [growth restrictions not penalty on travel]; Lawrence v. Oakes, 361 F.Supp. 432 (D. Ver. 3-judge court 1973) [housing restrictions not strictly reviewed]; Spatt v. State of New York, 361 F.Supp. 1048 (EDNY 1973) [higher non-resident tuition not unconstitutional].

Applying these recently developed principles to the concept of preferential parking clearly compels a conclusion

Mr. Gilbert H. Boreman

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March 17, 1976

that the strict scrutiny test of Shapiro is inapplicable. Non-residents either driving cross-town or commuting into a municipality can invoke at best the spurious "right to commute" rejected in Ector. Nor does the inconvenience of neighborhood parking restrictions imposed upon nonresidents constitute a constitutional penalty. Therefore, a preferential plan which creates a privileged class of resident parkers would be subject to judicial review on the traditional rational basis standard. So long as the governing body could articulate a public welfare rationale for the preferential parking system, and the particular system served that end, it would be upheld in court. McCulloch v. Maryland, 366 U.S. 420 (1961); Sosna v. Iowa, 95 S.Ct. 553 (1975).

III

BASIS FOR PREFERENTIAL PARKING

It is true that all state citizens have the right to equal use of the streets. Ex parte Daniels, 183 Cal. 636 (1920); People v. Fite, 267 Cal.App.2d 685 (1968). But it is just as true that different classes of people can be treated differently so long as the classification is not unreasonable or arbitrary. County of Alameda v. City and County of San Francisco, 19 Cal.App. 3d 750 (1971).

Against this background of legal maxims, a number of court cases have emphasized the need for cities to preserve a habitable environment for the general health of their citizens. As the United States Supreme Court stated in Berman v. Parker, 348 U.S. 26, 33 (1954):

"The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

In Construction Industry etc. v. City of Petaluma, supra, the Ninth Circuit Court of Appeals upheld growth restrictions enacted to preserve the small town character of a Northern California community. This public purpose was valid despite obvious economic consequences.

Mr. Gilbert H. Boreman

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March 17, 1976

In Village of Belle Terre v. Boraas, *supra*, the Supreme Court upheld a zoning scheme that limited dwelling occupancy to single families. The court noted at 416 U.S. 1, 9:

"A quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land-use project . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

In dissent on First Amendment grounds, Judge Marshall stated at 416 U.S. 1, 13-14 that permissible objects of municipal regulation included:

". . . restricting uncontrolled growth, solving traffic problems . . . and making the community attractive to families."

See also Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974) [lot size restrictions rationally related to public welfare].

Preferential parking would arguably serve several general public purposes. Traffic congestion from automobiles circling the block, double parking, as well as the number of cars entering the area of a traffic "attractor" would be reduced. Single occupant commuter vehicles would be discouraged from entering the city, thus encouraging the use of mass transit. It is undisputed that the cores of many major cities are deteriorating as middle class residents flee to the suburbs. Preferential parking would serve to eliminate or reduce one disincentive to City living by making it more comfortable to reside in row houses or multi-unit dwellings which often lack adequate off-street parking. As the court stated in City of Akron v. Davies, 170 N.E.2d 494, 496 (Ohio 1959):

"The power given to municipalities to regulate traffic and parking of automobiles on the streets of the municipality includes the power to adapt its regulations to fit existing conditions, and existing conditions may include the location, character and use of neighborhood buildings, for which reasonable and suitable exceptions may be made."

Mr. Gilbert H. Boreman

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March 17, 1976

Another possible interest involves the pollution caused by persons seeking parking in overcrowded areas. San Francisco was for a brief period of time subject to a federal traffic plan that provided for preferential parking. The prospect of being regulated in the future by the federal government could serve as an additional basis for adopting preference in residential parking. A federal appeals court in this regard upheld federal parking exemptions based on residency in connection with a pollution regulatory plan. South Terminal Corp. v. Environmental Protection Agency, 504 F.2d 646 (1st Cir. 1974).

IV

CONCLUSION

In view of the analysis set forth above, in my opinion it is within the power of the Board of Supervisors to enact a scheme of preferential parking in the city and county. Such a plan if reviewed by a court would be upheld so long as rationally related to general purposes of public welfare, several of which have been identified in this opinion. You are so advised.

Very truly yours,

PN

THOMAS M. O'CONNOR
City Attorney

March 23, 1976

MAR 13 1978

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Patrick Hallinan, President
Board of Permit Appeals
Room 252, City Hall
San Francisco, CA 94102

Subject: Applicability of Brown Act to Meetings
of the Board of Permit Appeals

Dear Mr. Hallinan:

You have inquired as President of the Board of Permit Appeals whether the meetings of that board are subject to the "open meeting" provisions of the Ralph M. Brown Act, Government Code Sections 54950 - 54961 inclusive. All references herein shall be to the Government Code unless otherwise noted. Based on a reading of both this statutory scheme and previous opinions of this office, I conclude that meetings of the Board of Permit Appeals are subject to the Brown Act and its open meeting provisions.

This office in the past has commented on a number of occasions as to the applicability of the Brown Act to various boards and commissions of the City and County of San Francisco. In Letter Opinion 72 - 78 (August 18, 1972) it was concluded that the Airports Commission was a "legislative body" within the meaning of the Brown Act (§54952), such that the conduct of its business, save for certain exceptions, was to be open to the public. In Letter Opinion 72 - 50 (July 3, 1972) the Act was impliedly held applicable to the deliberations of the Board of Supervisors. Meetings, even informal ones, of a county Board of Supervisors were held subject to the Brown Act in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, 263 Cal.App.2d 41 (1968). And in Letter Opinion 70 - 39 (July 21, 1970) the meetings of the Retirement Board were

Patrick Hallinan

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March 23, 1976

declared subject to the provisions of the Brown Act.

The policy behind the Brown Act as expressed in Section 54950 is to ensure that deliberations and actions of the commissions, boards, and legislative bodies of local agencies are conducted openly. To that end the meeting of such bodies must be open to the public (§54953) with certain exceptions. The definitions of the term "legislative body" as set forth in Section 54952.5 includes "planning commissions, library boards, recreation commissions, and other permanent boards or commissions of a local agency." Section 54952 defines "legislative body" to include "the governing board, commission, directors or body of a local agency, or any board or commission thereof, and shall include any board, commission, committee, or other body on which officers or a local agency serve in their official capacity as members. . ." Section 54951 defines "local agency" to include a chartered city and county or board, commission or agency thereof.

There are a number of exceptions to the open meeting requirement of the Brown Act as mentioned above. The one exception with perhaps the greatest interest to the Board of Permit Appeals is that concerned with attorney-client communications. While the Brown Act does not expressly provide that consultation between a board and its attorneys need not be public, that principle was recognized in Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, *supra*. This exception was discussed in depth in Letter Opinion 72-78, a copy of which is attached. Suffice it to say, the Board may in executive session confer with its attorneys to discuss anticipated, threatened or pending litigation in connection with matters before the Board.

Based on the above provisions of the Brown Act and the decisions and opinions interpreting it, it is my opinion that the meetings of the Board of Permit Appeals, except for authorized executive sessions, must be open to the public as required by the Brown Act. The Board of Permit Appeals is a permanent board of the City and County of San Francisco pursuant to Charter Section 3.650 and pursuant to Charter Section 3.651 carries out public business of said chartered city and county. Its deliberations and actions being part of the public's business clearly come within

^u
Patrick Hallinan

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March 23, 1976

the "opening meeting" declaration of intent of the Brown Act.
You are so advised.

Very truly yours,

PM

THOMAS M. O'CONNOR
City Attorney

March 25, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California

Subject: Effect of Supreme Court Decision
(McCarthy vs. Philadelphia) on San
Francisco Residency Requirements

Dear Mr. Boreman:

This office has reviewed your letter of March 24, 1976, in which you ask, on behalf of Supervisor Feinstein whether the U. S. Supreme Court Decision,

" . . . indicating that it is legal for local jurisdictions to enact ordinances to require City employees to reside within City boundaries, is considered to override State Proposition 5, enacted in November, 1974, which removed the authority of such legislation."

The decision to which you refer is McCarthy v. Philadelphia Civil Service Commission US Docket No. 75-738, decided March 22, 1976. That decision held that a Philadelphia city employee's residency requirement did not infringe on the constitutionally recognized right to travel of an employee who worked in and for the city of Philadelphia but lived in New Jersey. 1/ A question

1/ The plaintiff in the McCarthy case was a fireman. However, his occupation had no bearing on the court's decision which upheld generally a Philadelphia municipal ordinance which reads in relevant part,

"Every employee in the Civil Service of the City shall be required to maintain his bona fide residence in the City during the continuance of his employment by the City"

Mr. Gilbert H. Boreman

2

March 25, 1976

has arisen regarding the effect of that decision on the power of the city to impose residency requirements.

Historically, municipal employees' residency requirements have been adopted and imposed in many municipalities including San Francisco. The constitutional validity of those requirements has been the subject of considerable litigation.

In the recent case of Ector v. City of Torrance 10 C.3d 129, 109 Cal.Rptr. 849 514 P.2d 433 (1973) cert denied 415 U.S. 935, 94 S.Ct. 1451 39 L.Ed.2d 493 the California Supreme Court upheld a current residency requirement for city employees. The City and County of San Francisco appeared as amicus curiae advancing many justifications for a residency requirement. Noting the justifications presented by the City and County, the California Supreme Court reached the same conclusion in Ector as the U. S. Supreme Court reached in McCarthy: A municipal employee has no United States Constitutional right to be employed by a municipality while he is living elsewhere.

Additionally, in Ector the Court ruled that under the state constitution Article XI, Section 5b, municipalities were granted plenary power to prescribe in their charters the "qualifications" (including residency) of their employees.

Thereafter, on November 5, 1974, the voters of the State of California amended the State Constitution by adding Section 10.5 to Article 11. That section provides:

"A city or county, including any chartered city or chartered county, or public district, may not require that its employees be residents of such city, county, or district; except that such employees may be required to reside within a reasonable and specific distance of their place of employment or other designated location."

As a result of this amendment 2/ to the State Constitution, municipalities were divested of their power to impose employee residence requirements beyond requiring that employees reside within a specific and reasonable distance of their place of employment.

2/ The effect of this amendment on pre-employment residence requirements for job applicants was discussed in an opinion issued on February 26, 1976, addressed to Supervisor Barbagelata. A copy of that opinion is enclosed.

Mr. Gilbert H. Boreman

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March 25, 1976

The U. S. Supreme Court's decision in the McCarthy case holding that a citizen's United States constitutional rights are not violated by a municipal employee's residence requirement has no bearing on the effect of a state constitutional provision disabling municipalities from adopting residence requirements. The nature, scope and extent of the power which a state, in its constitution, chooses to give to its local governments to impose municipal employee residency requirements is not affected at all by the Supreme Court's decision in McCarthy.

It must be concluded then that the power of the City and County of San Francisco to impose an employee residency requirement remains unchanged and is governed by the limitations set forth in Article 11, Section 10.5 of the State Constitution.

Very truly yours,

BED

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

≡ Letter Opinion No. 76-26

March 29, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Designation of War Memorial as Historical Landmark - Conflict with Charter Section 3.610;
Your File No. 90-74-17

Dear Mr. Boreman:

This is in response to your request for an opinion as to whether there is any conflict between Charter Section 3.610 and the ordinance governing landmarks. It is my understanding that an ordinance designating the San Francisco War Memorial as a landmark is pending before the Planning, Housing and Development Committee of the Board of Supervisors.

Section 3.610 of the Charter is quoted in part as follows:

"The board of trustees of the San Francisco war memorial shall, under ordinance, have charge of the construction, administration and operation of said war memorial and of the grounds set aside therefor. The board shall consist of eleven members appointed by the mayor, subject to confirmation by the board of supervisors."

Pursuant to the authority of Charter Section 3.610, the Board of Supervisors enacted Chapter 27 of the San Francisco Administrative Code specifically granting authority of exclusive

Mr. Gilbert H. Boreman

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March 29, 1976

management to the Trustees of the War Memorial. This authority, of course, is an addition to the power set forth in the Trust previously assigned to and accepted by the City and County of San Francisco (see Opinion No. 75-127 outlining the history of the War Memorial Trust).

Section 27.3-1 of the San Francisco Administrative Code provides in part as follows:

"The trustees shall, subsequent to the construction of the war memorial, and during the construction thereof, administer, manage, superintend and operate the war memorial and the grounds set aside therefor, and all of its affairs."

This language is all inclusive as to the management authority of the Trustees of the War Memorial.

Article 10 of the San Francisco Planning Code provides for a procedure for the designation of historical landmarks, including structures owned by the City and County of San Francisco. The controls imposed on such landmarks by the ordinance are inconsistent with the foregoing authority granted to the Trustees of the War Memorial.

It is my opinion that the granting of landmarks status to the building would be inconsistent with the powers previously granted to the Trustees of the War Memorial.

Very truly yours,

RAK

THOMAS M. O'CONNOR
City Attorney

April 9, 1976

MAR 13 1978

Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California

DOCUMENTS DEPT.
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Subject: Legality of Wage Agreement
Effective for More Than
One Year

Dear Mr. Boreman:

This is in response to your request of February 26, 1976, on behalf of the Legislative and Personnel Committee, for my opinion regarding the legality of the City's entering into a wage agreement, the duration of which is more than one year.

Several provisions of the Charter are pertinent. Section 8.400 vests the Board of Supervisors with the power and duty of fixing all wages of City employees, with certain exceptions not pertinent herein, by the method provided in Section 8.401. Section 8.400(h) directs that all wage increases be determined when the annual budget estimates are prepared and when the annual budget and appropriation ordinances are adopted. In the same vein, Section 6.207 requires that the rates of compensation for all positions continued or created by the Board of Supervisors in their annual budget shall be set forth in an ordinance (the annual salary ordinance) passed at the same time the annual appropriations ordinance is passed.

Section 8.401 establishes the procedure by which wage increases are determined. The Civil Service Commission must submit a proposed schedule of compensations to the Board of Supervisors no less than every five years, and more frequently if warranted to reflect changes in economic conditions. This proposed schedule must be based solely on facts and data obtained in a comprehensive survey of the wages in private employment or

Mr. Gilbert H. Boreman

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April 9, 1976

in other governmental organizations in this state for like service and working conditions. The Board of Supervisors may approve, amend or reject the proposed schedule, but if the Board of Supervisors amends the proposed schedule, they must submit the data on which their amendments are based to the Civil Service Commission for review and analysis, and a report on the proposed changes. The wages set forth in the budget estimates, in the annual salary ordinance and appropriations therefor must be in accord with the schedule of compensations in the salary standardization ordinance as adopted by the Board.

It is my opinion that it is not legally possible for the City and County to be a party to a wage agreement, the duration of which is more than one year. If the City and County, acting by and through the Board of Supervisors, were to become party to a wage agreement, the duration of which was to be for more than one fiscal year, the terms of such agreement would purport to limit or restrict the powers vested in said Board or in a subsequent Board to exercise its judgment in the adoption of a salary standardization ordinance, an annual appropriation ordinance and an annual salary ordinance in a subsequent fiscal year. It is well established that one legislative body, such as a board of supervisors, cannot limit or restrict its own power or that of subsequent boards, and that the act of one, board does not bind its successors. (In re Collic 38 Cal.2d 396; County of San Diego v. Cal. Water Etc. Co. 30 Cal.2d 817; Wills v. Los Angeles, 209 Cal. 448.)

Very truly yours,

WPL

THOMAS M. O'CONNOR
City Attorney

May 10, 1976

MAR 13 1978

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Mr. James F. Wurm
Assistant General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco, California 94102

Subject: Section 10.27, San Francisco
Administrative Code; Offset
for Salary Overpayment

Dear Mr. Wurm:

This is in reply to your letter of April 30, 1976, questioning whether there is any necessity for a hearing procedure prior to the Controller exercising an offset for salary overpayments as is provided in Section 10.27 of the San Francisco Administrative Code. It appears from your letter that an employee continued to receive a salary increment for bilingual skills when such employee was actually not entitled to the increment. The employee, through her union representative, claims that she was entitled to a hearing prior to offsetting her salary for the alleged overpayment.

The United States Supreme Court has ruled that a prejudgment garnishment prior to the debtor having an opportunity to be heard was violative of due process of law under the Constitution. (Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).) Since then, the California courts have invalidated numerous prejudgment remedies where the debtor has not had an opportunity to be heard before property is summarily taken: claim and delivery (Blair v. Pitchess, 5 Cal.3d 258); garnishment of bank accounts (Randone v.

Mr. James F. Wurm

2

May 10, 1976

Appellate Department, 5 Cal.3d 536); wage garnishment procedure (McCallop v. Carberry, 1 Cal.3d 903; Cline v. Credit Bureau of Santa Clara Valley, 1 Cal.3d 908); garageman's lien (Adams v. Department of Motor Vehicles, 11 Cal.3d 146); and unlawful detainer (Mihans v. Municipal Court, 7 Cal.App.3d 479). In other jurisdictions the same constitutional infirmity was found to exist in the following cases: replevin (Fuentes v. Shevin, 407 U.S. 67 (1972)); innkeeper's lien (Klim v. Jones (N.D. Cal. 1970) 315 F.Supp. 109); landlord's lien (Hall v. Garson (5th Cir. 1970) 430 F.2d 430); and garnishment of accounts receivable (Jones Press, Inc. v. Motor Travel Services, Inc. (1970) 286 Minn. 205 [176 N.W.2d 87]).

Section 10.27 of the Administrative Code contains no provision for a hearing prior to exercise of the offset. It provides:

"Whenever any person whose salary or wage is paid out of the treasury of the city and county has been paid an amount in excess of that which such person was entitled to have received, such person shall upon the demand of the controller pay back into the treasury such excess salary or wage.

"In the event the repayment of such excess salary or wage in one payment would cause undue hardship on such person, the controller may, with the concurrence of the city attorney, permit the repayment to be made in equal monthly or biweekly installments.

"In the event of termination of service of such person before full repayment has been made, such person shall not be paid any of his retirement accumulations or credits, until repayment has been made in full.

"The city attorney is hereby authorized and directed to take such action as may be necessary to effect full recovery of any unpaid amount."

Mr. James F. Wurm

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May 10, 1976

The above quoted section becomes operable when the City and County unilaterally determines that the employee has been paid "an amount in excess of that which such person was entitled to have received." This determination is made without an opportunity for the employee to present any defenses to the offset. In view of the cases cited above, it is my opinion that a court could conclude that the offset of an employee's salary without giving notice to the employee or an opportunity to be heard would be violative of the due process clause of the Constitution. Accordingly, it is my recommendation that some form of notice and hearing procedure should be established when it is determined that the City will exercise an offset to recover a salary overpayment. The notice should merely inform the employee of the reason for the offset and an opportunity to present a defense, if any, to the proposed offset.

In accordance with my opinion, it is suggested that you circulate a memorandum to the Controller, each appointing officer, departmental personnel officers and payroll clerks advising them that notice and hearing procedures should be afforded prior to the exercise of a salary offset under Section 10.27 of the Administrative Code.

Very truly yours,

MCK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-29

May 11, 1976

MAR 13 1978

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Honorable Peter Tamaras
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Questions re Ordinance Relating to Conditional
Uses and Institutional Expansion; Board of
Supervisors' File No. 306-74

Dear Supervisor Tamaras:

This is in response to your recent letter inquiring about the proposed ordinance relating to conditional uses and institutional expansion. It is my understanding that Supervisor Kopp initially proposed the amendment of the Planning Code and that on March 18, 1976, the City Planning Commission approved amendments to the proposed ordinance so as to establish requirements for institutional master plans for institutions of higher learning, hospitals and sanitariums. The amendments would add Section 304.5 to the City Planning Code, requiring each accredited academic college, university and other institution of higher learning, each hospital and each sanitarium, to file with the Department of City Planning no later than December 31, 1976, a current institutional master plan, including a description of the institution's affirmative action program.

Your first two inquiries relate to the affirmative action requirement proposed by the Planning Commission. Their action raises the question of whether the City Planning Commission has authority to require an applicant for a conditional use permit

Hon. Peter Tamaras

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to file the institution's affirmative action program with the Department of City Planning.

The Fair Employment Practice Act, Labor Code, Section 1410 et seq., is a comprehensive statute clearly including within its provisions the area of employment discrimination which is presently of concern to the City Planning Commission. The Act expressly supersedes local ordinances.

"The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or of any other law of this state relating to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, or sex.

"Nothing contained in this part shall be deemed to repeal or affect the provisions of any ordinance relating to such discrimination in effect in any city, city and county, or county at the time this part becomes effective, insofar as proceedings theretofore commenced under such ordinance or ordinances remain pending and undetermined. The respective administrative bodies then vested with the power and authority to enforce such ordinance or ordinances shall continue to have such power and authority, with no ouster or impairment of jurisdiction, until such pending proceedings are completed, but in no event beyond one year after the effective date of this part."

Labor Code, Section 1432.

In brief, cities and counties lost their power to enforce local ordinances forbidding employment discrimination a year after the Act went into effect.

Hon. Peter Tamaras

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In 1969, the California Supreme Court, In Bank, stated:

"As to matters which are of statewide concern . . . home rule charter cities remain subject to . . . general state laws . . . if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. . . ."

Bishop v. City of San Jose,
1 Cal.3d 56, 61-62.

(See also In re Lane (1962), 58 Cal.2d 99; Abbott v. Los Angeles (1960), 53 Cal.2d 674; Agnew v. Los Angeles (1958), 51 Cal.2d 1; Pipoly v. Benson (1942), 20 Cal.2d 366.)

Accordingly, I am of the opinion that for the Planning Commission to require institutions to file their affirmative action program with it would be beyond their authority.

Furthermore, it appears that an ordinance requiring such action would in essence be a regulation adopted under the City's police power and as such is preempted by the Fair Employment Practice Act, which has been designated as an exercise of the state's police power. (Labor Code, Section 1411; Also, see 44 Ops.Att.Gen. 65 regarding a similar question arising in 1964 in the City of Oakland.)

Your last set of questions pertain to language in the proposed ordinance which would preclude the Planning Commission from taking any action on a conditional use application by a hospital or a sanitarium until review and comment is completed by the Comprehensive Health Planning Council. You state that the Planning Department staff now recommends a sixty-day time limit for the Council to submit its report. In my opinion, it is advisable to include a time period in the ordinance, after which time the Department of City Planning in its discretion could proceed with the processing of the conditional use application. As stated in Garavatti v. Fairfax Planning Commission (1971), 22 Cal.App.3d 145, at 150:

Hon. Peter Tamaras

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May 11, 1976

"The California law is well settled that despite the most general standards in a statute, the delegation of power to a planning commission or other administrative body is constitutionally valid with respect to the granting of a conditional use permit (City & County of S.F. v. Superior Court (1959) 53 Cal.2d 236 [1 Cal.Rptr. 158, 347 P.2d 294]; Stoddard v. Edelman (1970) 4 Cal.App.3d 544 [84 Cal.Rptr. 443]; Matthews v. Board of Supervisors (1962) 203 Cal.App.2d 800 [21 Cal.Rptr. 914]), the rationale being that it is a near impossibility to devise standards to cover all possible situations in which a use permit can be issued (Tustin Heights Assn. v. Bd. of Supervisors (1959) 170 Cal.App.2d 619, 634 [339 P.2d 914])."

To the extent that the City Planning Commission is vested by law with discretionary power to grant or deny a conditional use permit, "such discretion may not be lawfully abdicated or delegated." (City of Los Angeles v. Los Angeles Council (1949) 94 Cal.App.2d 36, 47.) To allow the Council an unlimited amount of time to report on a conditional use application could be construed as an attempt by the Planning Commission to delegate its discretionary authority to the Council, since by extended inaction the Council could effectively deny a conditional use application. The better course of action would be to include a time period in the ordinance and thereby preclude the possibility that the delegation of power argument will be made.

Very truly yours,

GEX

THOMAS M. O'CONNOR
City Attorney

May 13, 1976

MAR 13 1978

Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

DOCUMENTS DEPT.
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Subject: Fixing of Compensation for
Certain Employees Pursuant to
Section 8.401 of the Charter

Dear Mr. Boreman:

This is in reply to your request for my opinion as to whether or not, pursuant to Section 8.401 of the Charter, miscellaneous employees should receive "the same treatment insofar as the fixing of rates of pay, fringe benefits and similar items are concerned."

With regard to "miscellaneous" employees there are some fringe benefits which must, because of the Charter, be uniformly applied. These are vacations (§8.440), health benefits (§8.420) and retirement (§8.500).

Salaries or rates of compensation, on the other hand, are not so limited by the provisions of Section 8.401. That section does not require that all miscellaneous employees must be treated the same but rather requires that schedules of compensation recommended by the Civil Service Commission and adopted by the Board of Supervisors shall provide like compensation for like service based upon classifications. Stated simply, classifications in City and County service are to be paid like compensation for services as are similar classifications in other jurisdictions surveyed by the Civil Service Commission. Moreover, the Board of

Mr. Gilbert H. Boreman

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Supervisors is not compelled to adopt the schedules of compensation recommended to it by the Civil Service Commission but may amend or reject same if it deems other data so justifies such actions.

In essence, there are a few so called "fringe benefits" which are governed by specific provisions of the Charter and the Board is not free to deviate from those guidelines. However, in fixing rates of compensation for each individual classification governed by Charter Section 8.401 the Board, in the exercise of its discretion, is permitted to fix those rates of compensation for each classification at a level which the Board feels is prevailing based upon the data it has examined. There are other conditions of employment which fall into this category and these items are found in the administrative provisions of the annual salary standardization ordinance. These include such matters as work days, holidays, work weeks, overtime and shift differentials.

Charter Section 8.401 contemplates legislative discretion on the part of the Board of Supervisors and the courts will not interfere with that discretion unless it is so unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law. (City and County of San Francisco v. Boyd (1943) 22 Cal.2d 685, 690; Walker v. County of Los Angeles (1961) 55 Cal.2d 626; Saunders v. City of Los Angeles (1969) 273 Cal.App.2d 407; San Francisco Chamber of Commerce v. City and County of San Francisco (1969) 275 Cal.App.2d 499.) Section 8.401 of the Charter requires the Board of Supervisors to fix compensations for miscellaneous employees which "shall be in accord with the generally prevailing rates of wages for like service and working conditions" in private or public employment in this state. This imposes on the Board the duty to consider and weigh the data submitted by the Civil Service Commission with respect to each classification in City service so that it can set a wage which is in accord with the generally prevailing wages for similar work performed in private or public employment. The Board must, of necessity, treat each classification separately in arriving at a prevailing wage. Therefore, the schedules of compensation finally adopted by the Board of Supervisors should reflect the review of wage data for each class separately rather than treat all the classes alike. I find nothing

Mr. Gilbert H. Boreman

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in the Charter or in applicable case law which require the Board of Supervisors to treat all miscellaneous classifications the same with regard to rates of pay, fringe benefits and similar items.

Very truly yours,

THM

THOMAS M. O'CONNOR
City Attorney

SF City Attorney

Letter Opinion No. 76-31

May 21, 1976

MAR 13 1978

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The Honorable George R. Moscone
Mayor of San Francisco
200 City Hall
San Francisco, California 94102

Subject: Number of tenant Commissioners
Appointed to the San Francisco
Housing Authority

Dear Mayor Moscone:

You have asked whether you may appoint more than two tenants of the San Francisco Housing Authority as commissioners of said authority.

Section 34270 of the Health and Safety Code authorizes the appointment of Housing Authority Commissioners in pertinent part, as follows:

" . . . [T]he mayor, subject to the confirmation of a majority of the members of the governing body, shall appoint five persons as commissioners of the authority. The mayor shall appoint two additional commissioners who are tenants of the authority if the authority has tenants, or within one year after the authority first does have tenants. One such tenant commissioner shall be over 62 years of age if the authority has tenants of such age." (Emphasis added.)

Thus, it clearly appears from the context of the language that Section 34270 intends that there be seven commissioners

Hon. George R. Moscone

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May 21, 1976

appointed to the Housing Authority with only two of those commissioners being tenants of the Housing Authority. This intention is manifest from the manner in which the section provides first for the appointment of five persons without qualification and then by separate sentence expressly mandates that two additional commissioners who are tenants of the Housing Authority be appointed. The intent of a statute is determined from its language considered as a whole, and where the language used, given its ordinary and probable signification, is reasonably free from ambiguity and uncertainty, effect is given its plain meaning. (See City of Escondido v. Municipal Court (1967) 253 Cal.App.2d 801, 805; Estate of Sharp (1968) 257 Cal.App.2d 851, 855.) Moreover, if it was intended that there be more than two tenant commissioners, it would have been very simple to say just that. (See In re Hubbard (1962) 62 Cal.2d 119, 126.)

This interpretation of Section 34270 is bolstered by Health and Safety Code Section 34272 which sets forth the terms of commissioners wherein, in stating the terms of the tenant commissioners at two years, that section again refers to "two tenant commissioners." It should also be noted that this section sets the terms of the five other commissioners at four years.

In my opinion, therefore, you may appoint only two tenants as commissioners of the San Francisco Housing Authority.

Very truly yours,

EAB

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-32

June 1, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, Calif.

Subject: Preference Points on Civil Service
Examinations for Residents Within
the City and County

Dear Mr. Boreman:

This office has reviewed the request for an opinion conveyed by you on behalf of Supervisor Feinstein in which you ask, "... whether the City and County may legally provide that preference points be granted for residency within the City and County on promotional and/or entrance civil service examinations.

With regard to entrance examinations, you are referred to an opinion issued on February 26, 1976, No. 76-18-A. In that opinion this office advised that Section 16.98 of the Charter which imposes a one-year residency requirement on job applicants does not conflict with either the federal or the state constitutions and is therefore valid and enforceable. Accordingly, a one-year residency requirement is already in effect and is applied to job applicants for City employment. There is, therefore, no need for preference points to be given to residents on entrance examinations since nonresidents may not even take them. 1/

1/ This conclusion must be qualified by the exception appearing in Section 16.98(3) of the Administrative Code where the applicant is already a city employee complying with valid residence requirements. As to such a person the conclusions on civil service examinations would govern.

Mr. Gilbert H. Boreman

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June 1, 1976

With regard to the legality of giving preference points to residents on promotional civil service examinations (and entrance examinations when taken by employees) Section 10.5 of Article 11 of the California Constitution must be consulted. That section provides:

"A city or county, including any chartered city or charter county, or public district, may not require that the employees be residents of such city, county or district; except that such employee may be required to reside within a reasonable and specific distance of their place of employment or other designated location."

The question is whether this limitation on the power of municipalities to impose residency requirements would prevent the City and County of San Francisco from giving preference to resident-employees on promotional civil service examinations (and entrance examinations when taken by employees).

Historically, San Francisco has taken a leadership position in asserting the right of municipalities to require their employees to live within the municipal boundaries. When the residency requirement of the City of Torrance was invalidated by a lower court, Torrance appealed to the California Supreme Court. The City and County of San Francisco appeared and took an active part in that appeal. In Ector v. City of Torrance 10 Cal.3d 129 109 Cal.Rptr. 849 514 P.2d 433 (1973) cert.denied 415 US 931, 94 S.Ct. 1459 L.Ed.2d 493, the power of municipalities to impose residency requirements on their employees was upheld. The Court in Ector responded to the arguments advanced by the City and County of San Francisco by stating,

"Among the governmental purposes cited in these decisions or now urged by amici curiae are the promotion of ethnic balance in the community; reduction in high unemployment rates of inter-city minority groups; improvement of relations between such groups and city employees; enhancement of the quality of employee performance by greater personal knowledge of the city's conditions and by a feeling of greater personal stake in the city's progress; diminution of absenteeism and

Mr. Gilbert H. Boreman

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tardiness among municipal personnel, ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. We cannot say that one or more of these goals is not a legitimate state purpose rationally promoted by the municipal employee residence requirement here in issue."

This conclusion was reaffirmed by the U. S. Supreme Court in the case of McCarthy v. Philadelphia Court Service Commission U.S. _____ Docket No. 75-738 decided on March 27, 1976.

However, subsequent to the Ector decision, the California Constitution was amended by the addition of Section 10.5 to Article 11, quoted above. That section specifically prohibits municipalities from imposing residency requirements on employees.

Giving preference points to resident employees on civil service examinations would impose a disability on non-resident employees and would, in essence, conflict with the purpose and intent behind Article 11, Section 10.5 of the State Constitution. The ballot arguments advanced in support of Proposition 5 noted that,

"Residency requirements keep hundreds of highly qualified individuals from employment in those jurisdictions, and necessarily reduce the pool of qualified personnel entering employment in those communities."

A preference point system for resident employees taking civil service examinations would impose a disadvantage for non-residents and keep highly qualified individuals from full employment opportunity and advancement in civil service positions and necessarily reduce the pool of qualified personnel permitted to take examinations. In essence, such a preference would achieve by indirection what the State Constitution proscribes, i.e., a municipal employee residence requirement. An act which may not be legally done directly may not be legally done indirectly.

Further, Article 11, Section 10.5 of the State Constitution in providing that a municipality may require employees to reside within a reasonable and specific distance from the place of employment sets forth the single and exclusive method whereby a municipality may

Mr. Gilbert H. Boreman

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June 1, 1976

impose restrictions upon the place of residence of city employees which may be related to performance in city employment or advancement through civil service examinations. This provision appears to prohibit any other local regulation related to residence as a consideration in civil service examinations for city employees.

You are therefore advised that in my opinion preference points may not be given to resident employees on civil service examinations.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

BED

June 3, 1976

Mr. Bernard A. Orsi
General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco, California 94102

MAR 13 1978

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Subject: Salary Increment upon Promotion
Under 1974-75 Salary Standardization
Ordinance (James Kitchell, Beverly
Smith, Hernando M. Dula)

Dear Mr. Orsi:

This is in response to your request for my opinion interpreting the 1974-75 Salary Standardization Ordinance in reference to the promotion of three permanent 1426 Senior Clerk Typists to temporary positions in promotive Class 1468 Water Services Clerk (employees James Kitchell, Beverly Smith and Hernando M. Dula).

The employees were all in Step 4 of the 1426 compensation schedule (\$367 biweekly) when they were promoted to 1468 Water Services Clerk. On promotion they were placed in Step 4 of the 1468 compensation schedule (\$393 biweekly). The employees appealed this action to the Civil Service Commission alleging that the salary increment did not comply with Section VII(A)(1) of the 1974-75 Salary Standardization Ordinance which reads as follows:

"An employee or officer who is a permanent appointee following completion of the probationary period or six months of permanent service, and who is appointed to a position in a higher classification, either permanent

Mr. Bernard A. Orsi

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June 3, 1976

or temporary, deemed to be promotive by the Civil Service Commission shall have his salary adjusted to that step in the promotive class which is 7-1/2% above the salary received in the class from which promoted, or that step which is immediately in excess of 7-1/2%." (Emphasis added.)

In your letter you indicate that implementation of the above quoted ordinance has resulted in some employees receiving more than a 7-1/2% salary increase; and that you have interpreted the Salary Standardization Ordinance to authorize the placing of promoted employees in that salary step on the promotive salary schedule which is closest to a 7-1/2% increase. Thus, if a 7-1/2% salary adjustment results in the salary being equal to or greater than the midpoint between two steps on the salary schedule, you have adjusted the salary to the higher step and if the 7-1/2% increase is less than the midpoint, you have adjusted the salary to the lower step on the schedule.

Using this interpretation in the subject matter, the employees were placed on the fourth step of the schedule for 1468 Water Services Clerk (\$393 biweekly) because that step represents a 7.08% increase which is less than the midpoint between the fourth step (\$393 biweekly) and fifth step (\$411 biweekly). If the employees were placed on the fifth step, they would receive an 11.98% increase.

You have inquired whether this interpretation of Section VII(A)(1) of the 1974-75 Salary Standardization Ordinance is legally acceptable.

Section VII(A)(1) of the 1974-75 Salary Standardization Ordinance provides that an employee who is promoted shall have a salary adjustment in the promotive class:

"... which is 7-1/2% above the salary received in the class from which promoted, or that step which is immediately in excess of 7-1/2%." (Emphasis added.)

It is my opinion that this language requires that the promoted employee receive at least a 7-1/2% increase and, if a salary step does not provide such an increase, then the employee shall receive the salary in the next salary step which will provide at

Mr. Bernard A. Orsi

3

June 3, 1976

least a 7-1/2% salary adjustment. Under this interpretation, the subject employees should have been placed in the fifth salary step of the schedule for 1468 Water Services Clerk (\$411 biweekly) because the fourth step (\$393 biweekly) did not provide a 7-1/2% increase as required by the 1974-75 Salary Standardization Ordinance.

It should be noted that the 1975-76 Salary Standardization Ordinance has been amended to provide that upon promotion the employee shall receive a salary adjustment in the promotive salary schedule "which is closest to an adjustment which represents 7-1/2% above the salary received in the class from which promoted." Thus, the 1975-76 Salary Standardization Ordinance now authorizes a salary adjustment to the salary step which is closest to the 7-1/2% increase rather than increasing the salary to that step which is immediately in excess of a 7-1/2% adjustment which was provided in the 1974-75 ordinance.

Very truly yours,

MCK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-34

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June 4, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman, Clerk
Board of Supervisors
235 City Hall
San Francisco, California 94102

Subject: Legality of Youth Hostel in Fort Mason Pier Area
re Zoning

Dear Mr. Boreman:

This is in reply to your recent letter inquiring as to the legality of establishing a youth hostel in the Fort Mason pier area, which is part of the Golden Gate National Recreation area, in view of the current zoning of "public" and open space use designation.

I have been advised by the Department of City Planning that the National Park Service, an agency of the Department of the Interior, has proposed operating a youth hostel in the Fort Mason pier area, and that the Department of City Planning has already commented favorably on an environmental impact report. The National Park Service has the authority to promote and regulate the use of federal areas such as national parks. 16 U.S.C. 1. The Golden Gate National Recreation area is a national park. 16 U.S.C. 460bb.

Parenthetically, the Planning Code does not define a hostel, although Webster's New International Dictionary, 2nd Edition, unabridged, defines it as "1. a place of lodging; inn, 2. a residence for students."

Mr. Gilbert H. Boreman

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June 4, 1976

Zoning maps disclose that the Fort Mason pier area is in a "P" district, public use, and it has been so designated since November 20, 1962.

Section 234 of the Planning Code provides that "any lot in a P district may be occupied by a principal use listed in Sec. 234.1. . . ."

Section 234.1 provides:

"SEC. 234.1. Principal Uses Permitted,
P Districts.

"(a) Buildings and uses of governmental agencies not subject to regulation by this Code.

"(b) Public buildings and uses of the City and County of San Francisco, and of other governmental agencies that are subject to regulation by this Code, when in conformity with the Master Plan and the provisions of other applicable codes, laws, ordinances and regulations."

It is a well-established principle of law that the United States of America need not comply with local zoning ordinances. (See Arizona v. California, 283 U.S. 423, 75 L.Ed 1154.) Also see U.S. Government v. City of Chester (1944), 144 F.2d 415, at 420:

"A state statute, a local enactment or regulation or a city ordinance, even if based on the valid police powers of a State, must yield in case of direct conflict with the exercise by the Government of the United States of any power it possesses under the Constitution."

Finally, the United States Constitution provides in Article VI, Clause 2 for the supremacy of the laws of the United States:

Mr. Gilbert H. Boreman

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June 4, 1976

"Clause 2. Supreme Law of Land

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Accordingly, I am of the opinion that a youth hostel operated by the National Park Service may properly be operated in the Fort Mason pier area.

Very truly yours,

GEK

THOMAS M. O'CONNOR
City Attorney

June 14, 1976

MAR 13 1978

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Mr. Thomas Baker
Budget Office
Office of the Mayor
San Francisco, California 94102

Subject: Excess Costs for Hidden Valley and Log Cabin
Ranch Schools

Dear Mr. Baker:

This is in response to your recent inquiry regarding the authority of the Mayor to reject an item in the Juvenile Court budget. More particularly, I am advised that it is the Mayor's intention to eliminate \$89,000 "excess cost" payments from Hidden Valley budget and Log Cabin Ranch budget. The Mayor is not proposing to defund the budget for the operation of the Juvenile Court schools, since all expenditures for the operation of the Court schools are in the School District budget and not in the Juvenile Court budget. In brief, all expenditures for Court schools come from the School District General Fund.

You have indicated in your memorandum that the San Francisco Unified School District provides teachers to Hidden Valley, Log Cabin Ranch and Juvenile Hall, but requires "excess cost" only at the Valley and Ranch Schools. Further, your memorandum indicates that Mr. Joseph J. Botka, Chief Juvenile Probation Officer, suggested the \$89,000 was used to pay teachers' overtime at Valley and Ranch Schools and that such service after hours was not essential.

Mr. Thomas Baker

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June 14, 1976

Section 5030 of the Education Code provides:

"The governing board of a unified school district coterminous with the boundaries of a city and county, may conduct classes for wards of the juvenile court of said city and county, and acquire the necessary property and erect the necessary buildings therefor, outside of the boundaries of the said school district." (Emphasis added.)

Section 5030, which can only refer to San Francisco, was added to the Education Code in 1945 (Stats. 1945, c.1190, p. 2243, sec. 1), one year after the voters of San Francisco approved a \$1,250,000 bond issue for the construction of the present Youth Guidance Center.

The 1945 legislation, following the 1944 election, appears to authorize the San Francisco Unified School District to conduct classes at Youth Guidance Center, Log Cabin Ranch, and Hidden Valley Ranch with no reference to funding by the City and County of San Francisco.

As a further consideration, the Charter of the City and County of San Francisco, Section 6.203, speaks of the Mayor's power over the budget and specifies that the Mayor may "decrease or reject any item contained in the estimates. . . ."

This office has in the past advised Mr. Botka that the Mayor has the power under Charter Section 6.203 to review and modify those portions of the budget estimate relating to the Probation Office, Log Cabin Ranch School and Hidden Valley Ranch School.

Although the San Francisco Unified School District has objected to the elimination of the item from the Juvenile Court budget, it must be remembered that the Mayor is not proposing to reject an item in the School District budget. If he were, the 1927 California Supreme Court decision in Esberg v. Badaracco, 202 Cal. 110, would apply: the City and County of San Francisco

Mr. Thomas Baker

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June 14, 1976

has no authority to change the San Francisco Unified School District budget prepared by the Board of Education. (See City Att.Ops. No. 74-30, March 1, 1974; also see San Francisco Community College District v. City and County of San Francisco decided in the Court of Appeal on May 13, 1976, reaffirming the Esberg mandate: the function of the Board of Supervisors and Mayor is the ministerial one of levying the tax at the rate established by the School District.)

It is elementary that the San Francisco Unified School District's responsibility is to maintain schools for minor pupils who are residents of the City and County of San Francisco. (See Education Code, Section 12101 and Charter, Section 5.101.) To do that, the School District prepares and submits a budget which presumably enables the School District to meet its total obligation. Funds are derived from the School District tax and distributed to the San Francisco Unified School District to provide for all of the City's children, including those in the Court's custody.

I am of the opinion that the final sentence of your May 13th Memorandum is accurate:

"The separation of education from the City's budget intended that the School Board would determine its own total funding requirements."

You are so advised.

Very truly yours,

GEK

THOMAS M. O'CONNOR
City Attorney

June 15, 1976

MAR 13 1978

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Edward P. Joyce
Director Emergency Services
6221 Geary Blvd., 3rd Floor
San Francisco, CA 94121

Subject: Effect of "Proposition N" on San Francisco
Emergency Operations Plan

Dear Mr. Joyce:

This is in reply to your letter requesting my advice as to the effect of "Proposition N" with respect to the Office of Emergency Services. It is my opinion that the Mayor's emergency powers under Chapter 7 of the Administrative Code should be treated as entirely independent and separate from the Mayor's emergency powers under Sections 3.100 and 3.100-1 of the Charter.

Section 3.100 setting forth the Mayor's emergency powers was originally enacted in 1932 as Section 25 of the 1932 Charter. These powers have never been exercised in the case of disaster but have been used mainly in connection with internal problems of City government, especially those relating to employee and labor matters. Obviously, Section 3.100-1 (Proposition N) providing for the concurrence of the Board of Supervisors was adopted for the purpose of curbing the Mayor's emergency powers in labor controversies.

Chapter 7 of the Administrative Code was adopted pursuant to the authority contained in the former California Disaster Act (Military and Veterans Code §§ 1500, et seq.) now recodified as

Edward P. Joyce

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June 15, 1976

the California Emergency Services Act (Government Code §§3550, et seq.). Labor controversies are specifically excluded from the definition of "emergency" in Chapter 7 of our Administrative Code [Administrative Code § 7.1(b)].

The California Emergency Services Act confers authority on local governments transcending their charter authority and it also confers privileges and immunities which can only be provided by state law. This Act contemplates a statewide disaster plan which would cover emergencies existing statewide, as well as emergencies existing in a particular county or counties within the state. It further contemplates the formation of mutual aid regions, the exercise by local bodies of powers and authorities outside their respective boundaries, the execution of mutual aid agreements, complete plans of organizational set-up for the meeting of a disaster, and for state involvement and assistance. All these matter are covered by Chapter 7 of City's Administrative Code and by the many mutual aid agreements that have been entered into by City's Local Disaster Council.

Chapter 7 of the Administrative Code does not incorporate Section 3.100 of the Charter. While Section 7.6 states that the Mayor has the power "to proclaim the existence or threatened existence of a 'local emergency' as set forth under Section 3.100 of the Charter of the City and County of San Francisco and to terminate the local emergency," the provisions of 3.100 have not been incorporated into the ordinance as this is a mere reference to the nature of the Mayor's emergency powers which he could exercise independently of Chapter 7 of the Administrative Code and the California Emergency Services Act.

Again, if Section 3.100 were controlling, in the absence of the Mayor, the Acting Mayor would have this power, whereas Chapter 7 states that the Chief Administrative Officer as vice commander has the power in the absence of the Mayor to exercise the Mayor's emergency powers in the event a disaster occurs.

Section 7.1(b) of the Administrative Code states: "As used in this chapter, an emergency shall exist when proclaimed by the Mayor."

Edward P. Joyce

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June 15, 1976

Although the Board of Supervisors could amend the ordinance to provide for the concurrence of the Board before the Mayor could exercise this emergency powers as commander thereunder, until this is done, it is my opinion that Section 3.100-1 of the Charter is not applicable to a disaster emergency declared by the Mayor under the provision of Chapter 7 of the Administrative Code and that the concurrence of the Board is not necessary to this declaration of emergency or to actions taken pursuant to it for at least the first seven days. (See Government Code Section 8630 limiting a local emergency to seven days unless ratified by the government body.)

Very truly yours,

DM

THOMAS M. O'CONNOR
City Attorney

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6-37

SF City Attorney

Letter Opinion No. 76-37

June 22, 1976

Mr. Edwin S. Sarsfield
General Manager
Department of Social Services
P. O. Box 7988
San Francisco, Calif. 94120

MAR 13 1978

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Subject: Application of Civil Service Commission
Rules 23.02(b) and 23.03 to Charging
Time Against Sick Leave Credits

Dear Mr. Sarsfield:

This is in response to your questions regarding the application of Civil Service Commission Rules 23.02(b) and 23.03 to charging time off for medical and dental appointments against sick leave credits.

Section 8.400(g) of the Charter provides that "no officer or employee shall be paid for a greater time than that covered by his actual service; . . ." Since the expenditure of time by an employee for medical or dental appointments does not constitute "actual service" within the meaning of the Charter, they cannot be paid therefor.

It shall be noted, however, that the Civil Service Commission shall prescribe rules (Charter §8.360) pertaining to leaves of absence of City employees brought about by illness or disability (Charter §8.363). Civil Service Commission Rule 23 so provides.

A leave of absence granted "because of medical or dental appointments" constitutes "sick leave" within the meaning of Civil Service Commission Rule 23.02(b). Section 23.03 merely provides that "sick leave" as defined in Section 23.02(b) "may be granted (to employees) without the necessity of occupying a position for any period of time and may be granted for the periods of time . . . indicated in Section 23.02."

Mr. Edwin S. Sarsfield

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June 22, 1976

In light of the above sections, it is clear that the time expended by any employee at a medical or dental appointment is properly charged as time against sick leave credits.

However, the charging of such time should be limited to the actual time expended at such appointments rather than in increments of not less than four (4) hours.

Very truly yours,

MBL

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney
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Letter Opinion No. 76-38

July 2, 1976

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Honorable Albert C. Wollenberg, Jr.
Presiding Judge of the
Municipal Court
310 City Hall
San Francisco, CA 94102

Subject: Municipal Court; Power of Mayor
to Review Personnel Requisitions
Therefor

Dear Judge Wollenberg:

This is in response to your letter of June 17, 1976 wherein you request my opinion as to the applicability of the provisions of Section 1.1 of Ordinance No. 249-75, as amended (Annual Salary Ordinance, 1975-1976) to personnel requisitions of the Municipal Court.

Section 1.1 of Ordinance No. 249-75, as amended, provides, in part, as follows:

"Appointing officers as specified in the Charter are hereby authorized, subject to the provisions of this ordinance, to make or continue appointments as needed during the fiscal year to permanent positions enumerated in their respective sections of this ordinance. Such appointments shall be made in accordance with the civil service provisions of the Charter. Appointing officers shall not make an appointment to a vacancy in a permanent position until the Mayor shall approve the requisition for such service as herein provided. . ."

Honorable Albert C. Wollenberg, Jr.

July 2, 1976
Page 2

Identical language appears in the Annual Salary Ordinance for the fiscal year 1976-1977 (Ordinance No. 191-76, Sec. 1.1.)

Article 6, Section 5, of the State Constitution provides, in part, that each county of the state shall be divided into Municipal Court districts with a Municipal Court in each district of more than forty thousand (40,000) residents and further provides that the State Legislature shall prescribe for each Municipal Court the number, qualifications and compensation of judges, officers and employees.

Pursuant to the provisions of Article 6, Section 5, of the Constitution, the State Legislature has prescribed the number, qualifications and compensation of the judges, officers and employees of each Municipal Court in the State. (Government Code Sections 72000-74945.) The number and compensation of officers and employees of the San Francisco Municipal Court are set forth in Sections 74502, 74503 and 74504 of the Government Code. Section 74504.5 of the Government Code empowers a majority of the judges of the San Francisco Municipal Court, with the approval of the Board of Supervisors, to establish positions for officers, attaches and employees in addition to those provided by Sections 74502, 74503 and 74504 of the Government Code, to appoint and employ such additional officers, attaches and employees as they deem necessary for the performance of the duties of the Court and to adjust the rates of compensation of all Court personnel provided by Sections 74502, 74503, 74504 and 74504.5.

In the leading case of Slavich v. Walsh (1947) 82 Cal. App.2d 228, the court held, *inter alia*, that the authority which the City and County of San Francisco may have over clerks and deputy clerks of the San Francisco Municipal Court is inferior to that of the Legislature under its constitutional powers and that where the Legislature has acted its powers are supreme.

Honorable Albert C. Wollenberg, Jr.

July 2, 1976

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Accordingly, it is my opinion that neither the provisions of Section 1.1 of Ordinance 249-75, as amended, nor the provisions of Section 1.1 of Ordinance No. 191-76, which prohibit the filling of a position without prior approval of the Mayor, are applicable with respect to any position of the Municipal Court which has been established pursuant to the provisions of Sections 74502, 74503, 74504 or 74504.5 of the Government Code.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-39

9 July 1976

Mr. Daniel Mattrocce
Secretary, General Manager
San Francisco City and County
Employees' Retirement System
770 Golden Gate Avenue
San Francisco, California 94102

MAR 13 1978
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Subject: Subsection (L) of Section 8.509 of the Charter

Dear Mr. Mattrocce:

You have requested my opinion as to the applicability of subsection (L) of Section 8.509 of the Charter to a person retired under Section 8.509 who is convicted for having voted illegally. A review of the facts giving rise to your request for opinion indicates that this person was a member of the Retirement System prior to the enactment of said subsection (L).

Subsection (L) of Section 8.509 of the Charter provides as follows:

"(L) Notwithstanding the provisions of subsections (B), (C), (F) and (I) of this section, any member convicted of a crime involving moral turpitude committed in connection with his duties as an officer or employee of the City and County of San Francisco, shall, upon his removal from office of employment, pursuant to the provisions of this charter, forfeit all right to any benefits under the retirement system except refund of his accumulated contributions; provided, however, that, if such member is qualified for service retirement by reason of service and age under the provisions of subsection (B)

Mr. D. Mattrocce

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9 July 1976

of this section, he shall have the right to elect, without right of revocation and within 90 days after his removal from office or employment, whether to withdraw all of his accumulated contributions or to receive as his sole benefit under the retirement system an annuity which shall be the actuarial equivalent of his accumulated contributions at the time of such removal from office or employment."

Subsection (L) was approved by the electorate as part of Proposition F in the election held on November 8, 1966 and became effective on January 10, 1967. (Statutes, 1967, p.4307.) In addition to amending Section 8.509 of the Charter by adding thereto subsection (L), Proposition F also amended Section 8.509 by adding the provisions of paragraph (2) to subsection (E). Said paragraph (2) provides that if a member under Section 8.509 shall die prior to retirement but after having qualified for service retirement by virtue of years of service and attained age, his surviving spouse, if designated as his beneficiary, shall receive an allowance equal to one-half of the retirement allowance to which the member would have been entitled if he had retired for service on the date of his death.

It is a fundamental principle of public pension law that a public employee acquires a vested contractual right to a substantial pension upon rendering services to his employer while a member of a public pension plan and that this right cannot be abolished by subsequent changes in the law. (Kern v. City of Long Beach, 29 C.2d 848; Wallace v. City of Fresno, 42 C.2d 130, 183.) It is equally fundamental, however, that a public entity may make reasonable modifications and changes in its pension plan before the pension becomes payable and that, until that time, the employee does not have a right to any fixed or definite benefits but only to a substantial or reasonable pension. (Kern v. City of Long Beach, supra, at p. 855; Packer v. Board of Retirement, 35 C.2d 212, 214.) Thus, modification or alterations may be made in a pension plan for the purpose of keeping the pension system flexible to permit adjustments in accord with changing conditions and at the same time maintain the integrity of the system. However, in order to modify or alter constitutionally and validly the potential pension benefits of current members of the retirement plan, the proposed change must be

Mr. D. Mattrocce

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9 July 1976

reasonable, that is, it must bear some material relation to the theory of a pension system and its successful operation and changes in a pension plan which result in a disadvantage to current members must be accompanied by comparable new advantages. Ultimately, it is for the courts to determine upon the facts of each case whether a contemplated change in pension benefits is reasonable and valid. It is clear, however, that any contemplated modification which substantially decreases an employee's pension rights without providing any commensurate new benefit will be declared unreasonable and invalid. (Allen v. City of Long Beach, 45 C.2d 128; Abbott v. City of Los Angeles, 50 C.2d 433; Adler v. City of Pasadena, 57 C.2d 609; see also, City of Downey v. Board of Administration, 47 C.A.3d 621, 631-633.)

Your request, then, poses the question whether the change engrafted upon the retirement plan provided under Section 8.509 by the adoption of subsection (L) falls within the bounds of a reasonable modification or operates in such a manner as to impair the vested contractual rights of persons who were members under Section 8.509 prior to the effective date of subsection (L).

Subsection (L) provides, in effect, for forfeiture of retirement benefits by a member who falls within its terms. No such forfeiture was part of the retirement plan under Section 8.509 prior to the adoption of subsection (L). In fact, subsection (L) of Section 8.509 has provided at all times since the inception of the retirement program under Section 8.509 as follows:

"Upon the completion of the years of service set forth in subsection (B) of this section as requisite to retirement, a member shall be entitled to retire at any time thereafter in accordance with the provisions of said subsection (B), and nothing shall deprive said member of said right." (Emphasis added)

It is readily apparent that the retirement rights of a person who was a member under Section 8.509 prior to the addition of subsection (L) would be detrimentally affected if the provisions of subsection (L) were applicable to him. Consequently, said provisions would be constitutionally invalid as to such person unless the disadvantage imposed by such provisions were offset by compensating new benefits.

Mr. D. Mattrocco

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9 July 1976

As noted above, the only other change effected by the passage of Proposition F at the November 8, 1966 election was the addition of a new death benefit in the form of an allowance to the surviving spouse of a member who died after qualification for service retirement. Clearly, this new death benefit conferred an additional benefit upon persons who were members under Section 8.509. The critical question then is whether the addition of this death benefit adequately balanced the forfeiture of benefits imposed by subsection (L). It is readily apparent that a member who had qualified for service retirement prior to the effective date of subsection (L) had a constitutionally protected right to a service retirement allowance. Subsection (L) would deprive such a member of that right. Further, the new death benefit, while applicable to members who were qualified for service retirement and died prior to retiring, does not appear sufficient to offset the detriment imposed by subsection (L). On the one hand, Proposition F added a death benefit but on the other hand provided for forfeiture of "all right to any benefits under the retirement system except refund of his accumulated contributions. . ." In order to be considered comparable, an advantage relied on as offsetting a disadvantage must relate generally to the benefit that has been diminished. (Frank v. Board of Administration, 56 C.A.3d 235, 244.) It is my opinion that the addition of a new death benefit does not compensate for the detriment imposed by the provisions of subsection (L) and that, therefore, the provisions of subsection (L) do not apply to persons who were members of the Retirement System under Section 8.509 at the time of enactment. (See DeCelle v. City of Alameda, 221 C.A.2d 528)

Although the foregoing constitutes a full response to your request for opinion, I believe there are additional reasons why subsection (L) would not be applicable to the person involved in your request. It is my understanding that this person is retired under the Retirement System and has been and is now receiving a retirement allowance. Consequently, he is not now an officer or employee of the City and County of San Francisco. Subsection (L) provides that the forfeiture occur "upon his removal from office or employment pursuant to the provisions of this charter." Since the person involved in your request is not now an officer or employee of the City and County, there is no office or employment from which he can be removed. In addition, in order for the forfeiture to occur, the person involved must be "convicted of a

Mr. D. Mattroce

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9 July 1976

crime involving moral turpitude committed in connection with his duties as an officer or employee of the City and County of San Francisco." The person involved in your request is charged with having violated Section 14403 of the Elections Code of the State of California in that he did "willfully, unlawfully and fraudulently vote in an election, being then and there a person not entitled to so vote." Assuming, arguendo, that a violation of Section 14403 is a crime involving moral turpitude, in order for the provisions of subsection (L) to become operative, it is necessary that such crime be committed in connection with the person's duties as an officer or employee of the City and County of San Francisco. Since there do not appear to be any offices or positions in the City and County service which entail the duty of voting, a violation of Section 14403 of the Election Code would not be committed in connection with an officer's or employee's duties as such officer or employee.

You are advised accordingly.

Very truly yours,

DJS

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-40

July 12, 1976

MAR 13 1978

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Charles R. Gain, Chief
San Francisco Police Department
850 Bryant Street
San Francisco, California 94103

Subject: Office of Citizen Complaints;
Proposed by San Francisco Bar
Association

Dear Chief Gain:

This is in response to your request for an opinion whether the San Francisco Bar Association's proposal for the establishment of an Office of Citizen Complaints is legal under the existing Charter.

SAN FRANCISCO BAR ASSOCIATION'S PROPOSAL

The San Francisco Bar Association's proposal generally provides that there shall be established an Office of Citizen Complaints appointed by and accountable to the police commission. The purpose of this office is to investigate citizens' complaints of police misconduct and to provide for an "open and prompt investigation and disposition of complaints in a manner that protects the public and individual police officers." (P. 1, Proposal.)

The police commission shall appoint a Director of the Office of Citizen Complaints who shall serve at the pleasure of the commission. The Director is given authority to hire

Charles R. Gain

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and supervise a staff of investigators who shall conduct an investigation of complaints against members of the San Francisco Police Department. The Director shall also hire and supervise administrative, clerical, investigative and other personnel necessary for the administration of that office. Also, the proposal calls for the Director to recruit full-time hearing officers who shall be appointed by the police commission for one year terms. The hearing officers shall conduct hearings on complaints and shall submit to the Chief and to the commission findings and recommendations as to changes in department policies and practices.

The proposal contains specific procedures for the filing, review, investigation and hearing of complaints. The hearing officer shall transmit his findings of fact and conclusions and an advisory recommendation to the Chief of Police. The Chief shall approve, disapprove or modify the recommendation of the hearing officer and shall take appropriate disciplinary action including, if warranted, the filing of a charge for dismissal before the police commission. The Chief's decision must be based solely on the findings of the hearing officer.

After notification of the hearing officer's finding, the complainant and accused officer may petition the police commission for a hearing and the commission, in its discretion, may hear the matter. If such hearing is granted, the commission shall be limited to determine whether the hearing officer's or commanding officer's findings are supported by substantial evidence. In those instances where there has been filed a formal charge for dismissal or when the member has appealed a suspension under Section 8.343 of the Charter, the member shall receive a trial de novo.

The Bar's proposal also provides that the findings of hearing officers shall be on file and open to the public except for those complaints which are without basis in fact or which are uncorroborated.

ANALYSIS

Section 3.530 of the Charter prescribes the powers and duties of the police commission. It provides in pertinent part:

Charles R. Gain

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"The police commissioners . . . shall have the power and duty to organize, reorganize and manage the police department. They shall by rule and subject to the fiscal provisions of the charter, have power to create new or additional ranks or positions in the department . . ."

The above quoted language gives the police commission the power to create new or additional ranks or positions in the police department which ranks or positions shall be subject to civil service examination. However, the police commission can also create exempt civil service ranks or positions if they are approved by the civil service commission and the Board of Supervisors. If the civil service commission disapproves the exempt civil service ranks or positions, the Board of Supervisors can override such disapproval by a majority vote.

Section 3.530 of the Charter further provides that appointments to any noncivil service rank or position above the rank of captain can be made only from the rank of captain. The police commission shall have the power to recommend the salary of the newly created rank or position to the Board of Supervisors who shall be authorized to fix the salary for the current fiscal year. Thereafter the salary of the new rank or position shall be set under the provisions of Section 8.405 of the Charter. The police commission shall also have the right, from time to time, to establish and change the order or rank of noncivil service ranks in the police department.

The above summary of Section 3.530 of the Charter shows, in my opinion, that the police commission has the authority only to create or establish uniformed ranks within the department and that it does not have the right to create nonuniformed positions. The language "ranks or positions" in Section 3.530 must be construed as uniformed ranks or positions because of the condition that appointments to ranks or positions above the rank of captain must be made only from the civil service rank of captain. This limiting language would not be necessary if the commission had the power to create nonuniformed positions in the department. The intent of Section 3.530 is clear by this language that the police commission is not authorized to create civilian positions within the department.

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Further, Section 3.530 provides that the salary of a newly created exempt civil service rank or position shall be fixed by the Board of Supervisors on the recommendation of the police commission for the current fiscal year and thereafter such salary shall be set as provided for in Section 8.405. The salary setting procedures of Section 8.405 relate only to the compensation of uniformed forces of the police and fire departments. Therefore, the language of Section 3.530 shows that the new or additional ranks or positions which the police commission can establish refer only to uniformed ranks or positions in the police department.

Section 3.531 of the Charter designates certain ranks in the department and includes such "ranks or positions" as the police commission may create under the provisions of Section 3.530 of the Charter. This section further shows that the uniformed ranks of the department are those specifically designated in Section 3.531 and any newly created ranks or positions that are created by the police commission under its powers in Section 3.530.

It appears clear from the above discussion that the police commission does not have the authority to establish or create a nonuniformed Office of Citizen Complaints as proposed by the San Francisco Bar Association. Section 3.530 of the Charter authorizes the police commission to create only new or additional uniformed ranks or positions and since the personnel of the Office of Citizen Complaints would be nonuniformed, the police commission would have no power to create such an office.

The police commission does have the power to appoint a Chief of Police who shall hold office at its pleasure. (§3.532, Charter.) The Chief of Police is the executive or administrative head of the police department (see §3.500(h), Charter) and acts as "appointing officer" for the appointing, disciplining and removal of all officers, assistants and employees in the police department (§3.501, Charter). The Police Chief thereby acts as the appointing officer of both uniformed and nonuniformed personnel in the police department. The police commission has only the authority to appoint a Chief of Police who then is the appointing officer for that department. Therefore, the police commission cannot "appoint" nonuniformed personnel to staff an Office of Citizen Complaints.

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The Police Chief is given the power to make appointments to noncivil service uniform ranks or positions under the conditions set forth in Section 3.533 of the Charter. The police commission has no authority to "appoint" any employee of the police department except for the Chief who shall serve at its pleasure. (§3.532, Charter.) The Chief of Police is the executive officer of the police department and it is his responsibility to administer the affairs of that department, including any newly established Office of Citizen Complaints. (§3.500(h), Charter.)

ESTABLISHMENT OF AN OFFICE
OF CITIZEN COMPLAINTS

Positions in the City and County service may be created by appropriation ordinance of the Board of Supervisors as prescribed in Section 8.200 of the Charter. It provides that before the appointing officer shall recommend the creation of a new position, he shall request and receive from the civil service commission the proper designation and classification of such position based on its duties and responsibilities. If the position is to be included in the classified civil service, the civil service commission may express to the appointing officer as to whether or not the position is needed.

Under this procedure, the Chief of Police would recommend the creation of new positions to staff the Office of Citizen Complaints; the civil service commission would survey the proposed positions and classify them in accordance with their duties and responsibilities; and then the positions could be created only by appropriation ordinance of the Board of Supervisors.

If the newly established positions are included in the classified civil service, they would be filled from civil service eligible lists established by competitive examination. (§§8.321, 8.326, 8.329, Charter.)

DUTIES AND RESPONSIBILITIES OF THE
OFFICE OF CITIZEN COMPLAINTS

Section 8.343 of the Charter governs the disciplinary procedures against members of the police and fire departments. It generally provides that members of the police department who

Charles R. Gain

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are guilty of any offense or violation of the rules and regulations of the department shall be punished by reprimand, fine, suspension or dismissal after a trial and hearing by the police commission upon a verified complaint. The Police Chief may, however, summarily suspend a member for a period not to exceed ten days, subject to the member having a right of appeal to the police commission.

It is a general rule that powers conferred upon public agencies or officers which involve the exercise of judgment or discretion cannot be delegated to subordinates in the absence of statutory authorization; but public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action. (California School Employees Association v. Personnel Commission, 3 Cal.3d 139, 144-45 and cases cited therein; see also Brown v. City of Berkeley, 57 Cal.App.3d 223.) The Bar Association proposal provides that certain fact-finding matters and investigation of alleged police misconduct shall be conducted by the Office of Citizen Complaints. The conclusions are ultimately transmitted to the Police Chief who shall take disciplinary action, if warranted. The Chief of Police and the police commission have certain disciplinary responsibilities under Section 8.343 of the Charter and these responsibilities cannot be delegated to the Office of Citizen Complaints. However, that investigative office could properly conduct an investigation and determine facts which can be transmitted to the Chief of Police with an advisory recommendation. It is my opinion that as long as the Chief of Police and the police commission retain their discretionary powers of ultimately making a judgment in matters involving discipline that the fact-finding, investigation and recommendations of the Office of Citizen Complaints would be legal under the existing Charter. It must be emphasized, however, that the recommendation of the hearing officer can be advisory only and cannot be binding on the Police Chief or the police commission who may conduct their own further investigation and exercise their independent judgment and discretion pursuant to Section 8.343 of the Charter.

The proposal provides that after an investigation is conducted by the Office of Citizen Complaints, the Director may decide to close the matter and not proceed. The Police Chief and police commission must have the final decision whether or not to take

Charles R. Gain

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disciplinary action. Therefore, that portion of the proposal which allows the Office of Citizen Complaints to decide to close a disciplinary proceeding is invalid since it usurps the power of the Chief of Police and police commission to decide whether or not to proceed in disciplinary matters.

BROWN v. CITY OF BERKELEY DISCUSSED

It should be noted that the issues presented in your request for opinion have been the subject of recent litigation in the case of Brown v. City of Berkeley (Apr. 1976) 57 Cal.App.3d 223. In that case a taxpayer brought a suit to invalidate an initiative ordinance adopted by the voters to establish and grant certain powers to a Police Review Commission. The initiative ordinance provided that the commission shall review and make recommendations concerning practices and procedures of the Berkeley Police Department; and to receive, investigate and make recommendations with respect to complaints against the police department and its members. The ordinance precluded the police department from making its own internal investigations of complaints except when directed to do so by the Police Review Commission.

The Berkeley Charter provided that the city manager had complete discretion in the appointment, discipline and removal of all city officials and employees and neither the city council nor any of its committees or members could interfere with the exercise of that discretion. The charter also gave the city council the power to organize and maintain the police department.

The plaintiff taxpayer claimed that several provisions of the ordinance violated the charter and in particular that it interfered with the city manager's discretion in the appointment, discipline and removal of city officers and employees. The trial court held that the initiative ordinance was valid except for that portion which prevented the police department from conducting its own internal investigation of complaints against the department or its members.

The Court of Appeal affirmed the trial court judgment and further invalidated other portions of the ordinance. The charter provided that the city council and its members shall deal with the administrative services solely through the city manager. The initiative ordinance provided that the Police Review Commission had

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the power to require employees of the city clerk to supply clerical and secretarial assistance to the commission. The court held that the ordinance conflicted with the charter where it provided that the Police Review Commission need not go through the city manager for obtaining administrative services. The Brown case supports the conclusion that the San Francisco Police Commission has the authority to investigate the police department and to make pertinent recommendations but the establishment of an agency to perform that function must be in strict compliance with charter requirements.

The court held that the council's power to organize and maintain the police department clearly included the power to investigate it and to make pertinent recommendations. However, the court held that the ordinance conflicted with the charter where it gave the Police Review Commission the power to make specific disciplinary recommendations as to individuals. The court reasoned that the Police Review Commission could hear and investigate complaints concerning disciplinary matters, but it could not make specific recommendations as to individuals because the charter specifically prevented any interference with the city manager's discretionary powers in the appointment, discipline or removal of officers and employees.

The conclusion reached in the Brown v. City of Berkeley case prohibiting recommendations as to specific individual disciplinary matters turned on express charter language preventing any interference, either directly or indirectly, with the discretionary powers of the city manager over the appointment, discipline or removal of all officers and employees of the city. The court concluded that the recommendations of a fact-finding body would be prohibited by the express noninterference provisions of the Berkeley Charter.

The San Francisco Charter prohibits the Board of Supervisors from interfering with disciplinary actions in any department (§2.401) and it also prevents the Mayor from interfering with administrative affairs for which boards and commissions are responsible (§3.101). These sections would, under the authority of the Brown case, prevent the Board of Supervisors or the Mayor from conducting investigations and hearings and recommending disciplinary action with respect to officers and employees in the

Charles R. Gain

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various city departments. However, unlike the Berkeley Charter, there is no provision in the San Francisco Charter which would prohibit a city bureau established for the specific purpose of investigating and hearing complaints against the police department or its members from making a recommendation after completion of its investigation and hearing provided that such recommendation is not binding on the discretionary powers of the Chief of Police and police commission. The Bar Association proposal contemplates that the fact-finding role of the Office of Citizen Complaints would be advisory and in aid of the Chief of Police and police commission in their exercise of judgment and discretion in disciplinary matters. It is my opinion that the establishment of the Office of Citizen Complaints for that purpose would be legal under the existing Charter.

SUMMARY

It is my opinion that the positions in the Office of Citizen Complaints can be created only by appropriation ordinance of the Board of Supervisors through the procedures set forth in the Charter (§8.200); that the newly established positions must be civil service (§8.300, Charter); and that they can be filled only through competitive examination (§8.321, §8.326, Charter). The employees of the Office of Citizen Complaints must be appointed by the Chief of Police as required by Section 3.501 of the Charter and not by the police commission as presently provided in the proposal. It is my opinion that the Office could be made responsible to both the Police Chief and to the commission in fulfilling its duties and responsibilities set forth in the proposal. The provisions of the proposal which would preclude the Chief of Police from conducting his own independent investigation of the department or its members would be invalid. (Brown v. City of Berkeley, 57 Cal.App.3d 223.) Lastly, the investigation and determination of facts by the Office of Citizen Complaints does not constitute an improper delegation as long as such action is preliminary to the exercise of the judgment and discretion of the Chief of Police and the police commission under Section 8.343 of the Charter. With these exceptions, it is my opinion that the Bar Association's proposal could be implemented under the existing Charter.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

July 27, 1976

MAR 13 1978

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Mr. Bernard Orsi
General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco, California 94102

Subject: Q-35 Assistant Inspector Examination;
Effect of a Charter Amendment During
Pendency of Examination

Dear Mr. Orsi:

This is in reference to your request for opinion on whether an amendment to Section 8.405 of the Charter during the pendency of the Q-35 Assistant Inspector examination will affect the manner of selecting the oral board members for such examination. In particular you ask the following questions:

- "1. Does the passage of Proposition P at the November 4, 1975 election affect the Q-35 Assistant Inspector oral examination board procedures, in that this examination was established prior to November 4, 1975?
- "2. If the answer to number 1 is in the affirmative, does Proposition P mandate the Civil Service Commission to draw oral examination board members from cities in California of 350,000 or over population for the current examination?

Mr. Bernard Orsi

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- "3. If the answers to number 1 and number 2 are in the affirmative, is there any lawful means for the Civil Service Commission to draw oral board members from cities of less than 350,000 population, other than by Charter amendment?"

ANSWER TO QUESTION NO. 1

The examination for Q-35 Assistant Inspector began on August 12, 1975, with the publication of bibliography material; the written examination was administered on June 5, 1976; the scoring key was adopted on July 6, 1976; and oral examinations will commence in the near future.

Section 3.534 of the Charter prescribes the written and oral examination procedures for assistant inspector. In reference to the selection of an oral examination board it provides:

"In addition to the written portion of this examination, participants shall be examined orally by a board composed of three (3) supervisory officers having investigatory experience from those police departments in cities other than San Francisco surveyed under section 8.405 of this charter, who shall be selected by the civil service commission."

Section 8.405 of the Charter, referred to in the above quoted portion of Section 3.534, governs the setting of salaries for uniformed members of the police and fire departments. At the time that the examination for Q-35 Assistant Inspector commenced, Section 8.405 provided that the survey of police officers' salaries shall be conducted in all cities of "100,000 population or over" in the State of California. On November 4, 1975, Section 8.405 was amended (Prop. L) to require the salary survey to be conducted in all cities of "350,000 population or over" in the State of California.

It is a general rule of law that amendments affecting procedural rights are construed to apply to all cases pending at the time of the enactment unless the amendment affects a vested right. (Sutherland, Statutory Construction, 4th ed., Vol. 1A, §22.36,

Mr. Bernard Orsi

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p. 200.) Rights are vested only when they have become the property or present interest of a particular person as distinguished from rights which are expectant or contingent on the happening of some future event. (In re Dos Cabezas Power District (Ariz.) 498 P.2d 488, 492.) There is no vested right to the procedure for selection of oral board members because the oral examination had not been administered at the time of the amendment to Section 8.405. Therefore, since the amendment affects procedural rights, the amended Section 8.405 governs the oral board examination procedures.

ANSWER TO QUESTION NO. 2

The amendment to Section 8.405 of the Charter occurring at the November 4, 1975 election requires the Civil Service Commission, in accordance with Section 3.534 of the Charter, to select oral board examiners for the current Q-35 Assistant Inspector examination from police departments in cities with a population of 350,000 or over.

ANSWER TO QUESTION NO. 3

The amendment to Section 8.405 governs the size of the cities in which the Civil Service Commission must select oral board examiners for the Q-35 Assistant Inspector examination. There is no legal authority to select oral board examiners from cities with populations less than 350,000 and such authority could be granted only by Charter amendment.

Very truly yours,

MCK

THOMAS M. O'CONNOR
City Attorney

August 5, 1976

MAR 13 1978

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Mr. Carl M. Olsen
County Clerk
Superior Court
City and County of San Francisco
313 City Hall
San Francisco, CA 94102

Subject: Employment of Noncitizens
as Deputy County Clerks

Dear Mr. Olsen:

This is in response to your request for an opinion as to whether noncitizens may legally be employed as deputy county clerks and deputy clerks of the Superior Court and, if not, how those noncitizens who may already be employed may be terminated and what will be the effect of their acts while so employed.

You advise that deputies in your office sign notices, issue documents having legal effect such as summonses and subpoenas, accept and file various documents, and in general may exercise the powers and functions of the county clerk.

General laws provide that a county clerk must be an elector of the county (Government Code Section 24001). An elector is one who is entitled to vote under the Constitution, whether or not she or he is actually registered to vote (Election Code Section 20). United States citizenship is required of all electors (California Constitution, Article II, Section 2), and thus is required of the county clerk by operation of Government Code Section 24001. The same section requires that the clerk be a

Mr. Carl M. Olsen

August 5, 1976
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citizen of the State, which under Government Code Section 241 means that she or he must be either born within the State or be a United States citizen. Thus, federal citizenship is required by both provisos.

However, no specific reference is made to deputy county clerks in the Government Code. It is true that a deputy has the powers and duties of the principal (Government Code Section 1194) and that the deputy is included in any statute creating liability in the principal (Government Code Section 24100), but qualifications for employment are seemingly not included.

In charter counties the qualifications of county officers and their deputies may be provided for in the charter. California Constitution, Article XI, Section 4(f). The county clerk is such an officer under Charter Section 1.103 as well as Government Code Section 24000. Similar powers exist in charter cities (California Constitution, Article XI, Section 5(b)):

"The hiring of employees generally by the city to perform labor and services in connection with its municipal affairs . . . is not subject to or controlled by general laws."

City of Pasadena v. Charlesville (1932) 215 Cal. 384, 389. It is true that in the same case the Supreme Court held that State laws barring aliens from public employment related to matters of statewide concern and preempted municipal laws, *id.* at 398, but that holding seems to have been significantly undermined by more recent holdings that prohibiting alien employment is not a proper State purpose. Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566. In any event, the general laws barring alien employment (Labor Code Sections 1940-1947, 1850-1854) have been repealed, leaving no State policy on the matter and presumably leaving the matter within the powers of charter cities and counties. See Stats. 1970, c. 652-653.

Mr. Carl M. Olsen

August 5, 1976
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Section 8.100(c) of the San Francisco Charter, as well as Section 16.97 of the Administrative Code, require that all officers and employees of the City and County be United States citizens. Thus, it is immaterial whether a deputy county clerk is an officer or any employee, although for other purposes, at least, it is likely that a deputy is an officer. Moreover, for purposes of constitutional analysis we must look to the actual duties of the position and not to its label.

In recent years, several important cases have focused on the power of states to exclude aliens from various public programs. In Graham v. Richardson (1971) 403 U.S. 365, the United States Supreme Court held that a state could not deny welfare benefits to noncitizens, stating that ". . . classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny." Id. at 372. In Sugarman v. Dougall (1973) 413 U.S. 634, the blanket exclusion of aliens from New York's competitive civil service was declared invalid. However, the Court did not decide the question whether a more narrowly drawn statute might be upheld which applied

"to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of respective government."

Id. at 647. Both In re Griffiths (1973) 413 U.S. 717 and Raffaelli v. Committee of Bar Examiners (1972) 7 Cal.3d 288 have struck down the exclusion of aliens from the legal profession. Most recently, in Hampton v. Mow Sun Wong (1976) U.S. 96 S.Ct. 1895, the Court struck down federal civil service rules barring aliens on the ground that Congress had not delegated that power to the Civil Service Commission, although the equal protection question was not reached. And the California Supreme Court

Mr. Carl M. Olsen

August 5, 1976
Page 4

has held, in Purdy & Fitzpatrick v. State of California, supra, that Labor Code Section 1850, forbidding employment of aliens on public works, also violated the equal protection clause. 71 Cal.2d at 578-586. The Court also held that Section 1850 conflicted with the federal statutory scheme to regulate immigration matters, although that holding has been called into question (at least as to illegal aliens) by DeCanas v. Bica (1976) U.S. _____, 96 S.Ct. 933 (construing Labor Code Section 2085(a)).

The rationale for these cases has been stated in Purdy & Fitzpatrick, supra, as follows:

"The discrimination involved denies arbitrarily to certain persons, merely because of their status as aliens, the right to pursue an otherwise lawful occupation. The classification within the statutory scheme operates irrationally without reference to any legitimate state interest except that of favoring United States citizens over citizens of other countries. This latter objective does not reflect such a compelling state interest that it would permit us to sustain this kind of discrimination."

71 Cal.2d at 585. This principle has been reiterated in Alonso v. State of California (1975) 50 Cal.App.3d 242, 248 (dictum):

"In the area of employment, aliens lawfully in the United States have a right to earn a living in the ordinary occupations of the community. . ."

It is clear under these cases that the statutes, charter sections and ordinances which purport to deny employment to aliens are invalid unless they are demonstrably related to a compelling state interest. Under Sugarman v. Dougall, supra, it is apparent

Mr. Carl M. Olsen

August 5, 1976
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that no such justification can be found for the blanket prohibition on alien employment found in Charter Section 8.100(c) and Administrative Code Section 16.97. Accordingly, it is my opinion that they are unconstitutional and void.

A different situation exists with respect to Government Code Section 24001, since that statute applies only to county clerks. Assuming arguendo that that section governs charter cities and counties, and assuming further that it would apply to the selection of deputies as well as the principal county clerk, it seems that Section 24001 is likewise unconstitutional insofar as it requires that a deputy county clerk be a United States citizen.

The opinion in Sugarman v. Dougall, supra, strongly implies that the distinction to be drawn, if any, is between minor or ministerial employees and "officers who participate directly in the formulation, execution, or review of broad public policy . . ." 413 U.S. at 647. Whether the county clerk falls in this latter category we need not decide, but clearly his deputies do not. Although deputies are sworn and perform various ministerial functions in the name of the State of California, this does not determine the issue.

In this regard, the case of In re Griffiths (1973) 162 Conn. 249, 294 A.2d 281 (1972), rev'd, 413 U.S. 717, is instructive. The Connecticut Supreme Court upheld the exclusion of aliens from the practice of law, relying in part on the fact that

" . . . in Connecticut each attorney-at-law admitted to practice within the state, while in good standing, is a commissioner of the Superior Court and in that capacity, may, within the state, sign writs, issue subpoenas, take recognizances and administer oaths . . . Connecticut attorneys may issue writs of attachment . . .

Letter Opinion No. 76-42

Mr. Carl M. Olsen

August 5, 1976

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"Attorneys are empowered to 'command' actions by county sheriffs and town constables . . . '[b]y authority of the state of Connecticut.' "

294 A.2d at 284. However, in reversing the case, the United States Supreme Court held that these powers

"hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens."

413 U.S. at 724. The Court also held that the possibility that such powers could be used to undermine the national interest was too remote to justify the state action. The possession of similar powers by deputy county clerks in California therefore does not justify the exclusion of aliens from such positions.

Your letter also refers to the possible right to exclude aliens from positions requiring the employee to carry concealable firearms, or involving the registration of voters. Since in San Francisco the registrar of voters handles all election matters (See Election Code Section 17), the latter reference does not directly govern the employment of deputy county clerks; it is possible that the exclusion of aliens as registrars might be upheld on the ground that they are intimately involved in the election process, from which aliens are excluded as voters.

With respect to positions involving concealable firearms, a prior opinion of this office (Letter Opinion No. 69-5, dated January 20, 1969) held that aliens could be excluded from such positions on the authority of Penal Code Section 12021(a), which at that time had not been challenged or repealed. Since then, however, the portion of Penal Code Section 12021(a) referring to aliens has been declared invalid and later repealed on the ground that it

"has no reasonable relationship to the threat to public safety which Penal Code section 12021 was ostensibly designed to prevent."

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Mr. Carl M. Olsen

August 5, 1976
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People v. Rappard (1972) 28 Cal.App.3d 302; see Stats. 1974, c. 1197, p. 2588, Sec. 1. Accordingly, Letter Opinion No. 69-5 must be deemed superseded by the Rappard decision and the repeal of the language in question.

Accordingly, you are advised that Section 8.100(c) of the Charter and Section 16.97 of the Administrative Code are unconstitutional and void, and that Section 24001 of the Government Code is unconstitutional and void insofar as it purports to require United States citizenship as a condition of eligibility to the position of deputy county clerk.

Very truly yours,

DMS

THOMAS M. O'CONNOR
City Attorney

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= Letter Opinion No. 76-43

August 9, 1976

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Charles R. Gain, Chief
San Francisco Police Department
Hall of Justice
850 Bryant Street
San Francisco, CA 94103

Subject: Custody and Disposition of Personal
Property of Persons Confined in the
City Prison and County Jail

Dear Chief Gain:

This is in response to your request of June 8, 1976
for my opinion as to the following question:

"Is either a court order or authorization from
the prisoner a necessary prerequisite to the
Sheriff's Office releasing personal property
of prisoners confined in the City Prison and/
or County Jail where the party to whom the
property is to be released is the arresting
law enforcement agency and the purpose is to
reclassify the property as evidence?"

Section 26640 of the California Government Code pro-
vides:

"The sheriff shall take charge of, safely
keep, and keep a correct account of, all money
and valuables found on each prisoner when de-
livered at the county jail. Except when

Charles R. Gain, Chief

2

August 9, 1976

otherwise ordered by a court of competent jurisdiction, the sheriff shall pay such money or sums therefrom and deliver such valuables or portions thereof as the prisoner directs and shall pay and deliver all the remainder of his money and valuables to the prisoner or to his order upon his release from the jail or to his legal representative in case of his death or insanity."

Although the above quoted does not expressly apply to police officers of a municipality, the California Supreme Court has held that the section does apply to such police officers. Minsky v. City of Los Angeles (1974) 11 C.3d 113.

The purpose of Section 26640 is to ensure the safekeeping of property in the possession of one arrested. The section is not intended to preclude a county sheriff from releasing such property to a municipal police department which is responsible for the investigation of the prisoners suspected of criminal activity. People v. Rogers (1966) 241 C.A.2d 384.

People v. Rogers, supra, presented a situation analagous to that existing between the police department and sheriff's office of the City and County of San Francisco. In Rogers, the prisoner, a burglary suspect, was searched when he was booked at the police station, and the articles on his person were removed from his possession and taken into the custody of the police. Some of these were booked as evidence and placed in an evidence locker, and the remaining articles, including ten keys, were kept by the police in an individual personal property locker. When Rogers was turned over to the sheriff's office, both sets of articles taken from his person were likewise delivered to the sheriff's custody. At a later time a Covina police officer investigating the burglary of the Alano Club obtained the ten keys from the sheriff's office, where they were being held for safekeeping along with Rogers' personal effects, and tested them on the locks at the burglarized premises. At the trial the keys were identified by employees of the burglarized club as the club's keys and were admitted into evidence.

Charles R. Gain, Chief

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August 9, 1976

The Court of Appeals rejected the prisoner's claim of an unwarranted search, stating, at pages 389-390:

"This section [section 26640] codifies the long established right to search a prisoner when he is booked at the police station in order to prevent weapons and contraband from being brought into the jail, and to remove his personal effects from him. [Citations] Once articles have lawfully fallen into the hands of the police they may examine them to see if they have been stolen, test them to see if they have been used in the commission of a crime, return them to the prisoner on his release, or preserve them for use as evidence at the time of trial. [Citations] During their period of police custody an arrested person's personal effects, like his person itself, are subject to reasonable inspection, examination, and test. [Citations] Whatever segregation the police make as a matter of internal police administration of articles taken from a prisoner at the time of his arrest and booking does not derogate the fact of their continued custody and possession of such articles."

In view of the foregoing, it is my opinion that neither a court order nor authorization from the prisoner is a necessary prerequisite to the Sheriff's Office releasing personal property of prisoners confined in the City Prison and/or County Jail where the party to whom the property is to be released is the arresting law enforcement agency and the purpose is to reclassify the property as evidence.

You are accordingly advised.

Very truly yours,

DH

THOMAS M. O'CONNOR
City Attorney

17
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SF City Attorney

Letter Opinion No. 76-44

August 13, 1976

MAR 13 1978

Honorable Quentin L. Kopp
Board of Supervisors
235 City Hall
San Francisco, California 94102

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Subject: Property Tax Exemption Legislation

Dear Supervisor Kopp:

This is in response to your letter of July 15, 1976, wherein you request that I draft a proposed ordinance which would incorporate features similar to those embodied in three tax-forgiveness ordinances enacted by the City of Wilmington, Delaware (Wilmington Ordinance Nos. 72-080, 72-081 and 74-078).

The Wilmington ordinances were enacted under authority granted by the Constitution of the State of Delaware. Article VIII, § 1 of the Delaware Constitution, allows municipalities to exempt property within their jurisdiction from taxation if it "will best promote the public welfare." Under California law, local entities do not have similar authority. In California, property tax exemptions can only be granted by the California Constitution or by statute authorized by the Constitution. California Constitution, Article XIII, § 1, states in relevant part:

"Unless otherwise provided by this Constitution or the laws of the United States.

"(a) All property is taxable and shall be assessed at the same percentage of market value. . . ."

Hon. Quentin L. Kopp

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August 13, 1976

In First Unitarian Church v. County of Los Angeles (1957) 48 C.2d 419, at page 426, the Supreme Court stated:

"An exemption from taxation is the exception and the unusual. To provide for it under the laws of this state requires constitutional or constitutionally authorized statutory authority."

(See also Lundberg v. County of Alameda (1956) 46 C.2d 644.) In Goodwill Industries v. County of Los Angeles (1953) 117 C.A.2d 19, at page 26, the Court of Appeal stated that:

"Tax exemption is . . . a legal right conferred by constitution and statute. Erroneous allowance of tax exemption . . . does not . . . effectuate amendment of the constitution or the taxing statutes."

The California Legislature sought and obtained voter approval of Proposition 8 at the November 1974 election. Proposition 8 completely revises and reorders Article XIII, the main source of property tax exemptions. While Proposition 8 made a number of significant substantive changes in Article XIII, it did not confer upon local government any broad authority to grant property tax exemptions such as found in the Constitution of the State of Delaware. Property tax exemptions continue to be strictly governed by state law.

Accordingly, I must advise you that any local legislation which would attempt to exempt property from taxation would be unconstitutional. For the above reasons, the requested legislation is not forwarded to you.

Very truly yours,

WFS

THOMAS M. O'CONNOR
City Attorney

August 16, 1976

MAR 13 1978

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Mr. Gilbert H. Boreman
Clerk of the Board
Board of Supervisors
235 City Hall
San Francisco, CA 94102

Subject: File No. 94-76
Applicability of "Rule of Three"
to Persons on Eligible Lists

Dear Mr. Boreman:

This is in response to your letter of August 13, 1976 wherein you advise that your Board has under consideration a proposed Charter amendment which would amend Section 8.329 of the Charter to provide that an appointing officer, in filling a vacant position, could appoint from the three (3) persons highest on the list of eligibles rather than being required to appoint the person highest on the list, as is now the case. Supervisor John L. Molinari has requested my opinion as to the applicability of this proposal to persons on eligibility lists at the time any such Charter amendment would become effective if submitted to, and approved by, the voters of the City and County.

The applicability of the proposed Charter amendment to persons on a list of eligibles on the date it would become effective would depend upon whether or not any right which such person might have to appoint under the "rule of one" is a vested right.

Mr. Gilbert H. Boreman

August 16, 1976

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A "vested right" which may not be interfered with by retrospective laws is an interest which it is proper for the State to recognize and protect and of which the individual cannot be deprived arbitrarily without injustice. (American States Water Service Co. v. Johnson (1939) 31 Cal.App.2d 606, 614.)

With respect to Civil Service matters, it has been specifically held that a right to be placed in a particular position on a list of eligibles for appointment to a Civil Service position is not such a "vested right" as cannot be taken away by amendment of a charter. (Jones v. O'Toole (1923) 190 Cal. 252.)

Accordingly, it is my opinion that persons on eligibility lists for Civil Service positions do not have a vested right to selection under the "rule of one" and hence the proposed Charter amendment would, if submitted to and approved by the voters, be applicable to such persons.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

August 16, 1976

MAR 13 1978

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Mr. Patrick J. Mahler
Employee Relations Director
252 City Hall
San Francisco, California 94102

Subject: Necessity of Meeting and Conferring
on Certain Issues Presently Being
Acted Upon by the Board of Supervisors

Dear Mr. Mahler:

This is in response to your request for my opinion as to whether or not the City and County of San Francisco is obligated to meet and confer on some matters presently before the Board of Supervisors which affect or are within the broad definition of wages, hours and other terms and conditions of employment.

The issues you refer to are described as "changes in the rule-of-one, retirement contributions, benefits, etc., exempting positions from civil service and the proposal to terminate City workers who strike or support a strike."

The "issues" appear to be the subject of various proposed Charter amendments which the Board of Supervisors are presently contemplating placing on the November 1976 ballot for voter action.

A similar question arose in early March 1976 and I advised Mr. Gilbert Boreman, Clerk of the Board of Supervisors, on March 9, 1976, that the Board has the power, pursuant to Article XI, Section 3(b) of the California Constitution, to place proposed Charter

Mr. Patrick J. Mahler

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August 16, 1976

amendments on the ballot without first having met and conferred on the issues involved therein prior to the time said action is taken. In matters such as this, the important question is not whether the issue is in fact a matter of wages, hours and other terms and conditions of employment and therefore within the scope of representation, but is rather a matter of whether or not the Board has, via a higher authority (the Constitution), the unfettered power to submit such Charter amendments to the electorate.

In People of the State of California v. City and County of San Francisco, Superior Court No. 706-350 filed June 11, 1976, this is one of the issues the subject of litigation and the City and County has taken the position as set forth above. The matter was argued in June and is presently under submission. This action, in quo warranto, is brought in the State's name but is actually being prosecuted by various craft unions which represent City employees.

Assuming the "issues" to which you make reference in your request and which are requested to be the subject of meeting and conferring are in fact proposed Charter amendments, you are advised that the City and County is not at the present time obligated to meet and confer on same.

Very truly yours,

MHM

THOMAS M. O'CONNOR
City Attorney

SF City Attorney

Letter Opinion No. 76-47

August 16, 1976

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Honorable Quentin L. Kopp
President
Board of Supervisors
235 City Hall
San Francisco, CA 94102

Subject: Supervision and Control Over
Departments Under Chief
Administrative Officer Upon
Retirement of Incumbent

Dear Supervisor Kopp:

This is in response to your letter of July 30, 1976 wherein you advise that the incumbent Chief Administrative Officer is scheduled for a mandatory retirement this month and request an opinion as follows:

"If a Chief Administrative Officer is not appointed and confirmed and approved by the Board of Supervisors on or before the date of retirement of the incumbent, can those departments set forth in Section 3.510 be directed legally with respect to their functions, activities and affairs by a person other than the Chief Administrative Officer duly appointed, confirmed and approved pursuant to Section 3.200."

Honorable Quentin L. Kopp

August 16, 1976

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Section 3.200 of the Charter establishes the office of Chief Administrative Officer and mandates the Mayor to appoint a person to that office subject to confirmation and approval of the Board of Supervisors. Section 3.201 of the Charter enumerates in general the functions, powers and duties of the Chief Administrative Officer. Section 3.510 of the Charter enumerates the administrative departments of the City and County placed under the direction of the Chief Administrative Officer. Scattered elsewhere throughout the Charter are specific provisions relating to the functions, powers and duties of the Chief Administrative Officer. (See: Proposed Charter Amendment, Board of Supervisors" File No. 541-75.)

In addition, the San Francisco Administrative Code is replete with provisions relating to the functions, powers and duties of the Chief Administrative Officer. (See: San Francisco Administrative Code, Index, Chief Administrative Officer.)

With reference to the exercise of the functions, powers and duties delegated to the Chief Administrative Officer in the Charter or by ordinance or resolution of the Board of Supervisors, Section 2.101 of the Charter provides that "The powers of the city and county . . . delegated to other officials . . . by this charter . . . shall be exercised as provided in this charter. The exercise of all rights and powers of the city and county when not prescribed in this charter shall be as provided by ordinance or resolution of the board of supervisors."

Thus, in my opinion, where the Charter or an ordinance or resolution of the Board of Supervisors vests a function or a power of the City and County exclusively in the Chief Administrative Officer or imposes a duty upon said officer, only a person duly appointed, confirmed and approved as the Chief Administrative Officer, pursuant to the provisions of Section 3.200 of the Charter, may exercise that function or power or discharge that duty.

Accordingly, in answer to your specific inquiry, my answer is in the negative.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

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Letter Opinion No. 76-48

August 18, 1976

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Richard H. Schooler, Esq.
Legal Counsel to the Sheriff
Room 333
City Hall
San Francisco, CA 94102

Subject: Application of Jail Sentence
Credit Statute (Penal Code
Sections 4018.1)

Dear Mr. Schooler:

This is in response to your request for an opinion which you sent to the Attorney General and which was subsequently forwarded to this office for reply.

You request an interpretation of Penal Code Sections 4018.1 and 4019. Your specific question is whether a prisoner arrested on charges, who serves thirty (30) days before the charges are dropped and then serves another thirty (30) days awaiting a probation revocation hearing and who is sentenced to county jail on the probation revocation is entitled to good time and work time credits for the full sixty (60) days in custody prior to sentencing or only for the thirty (30) days in custody on the probation revocation charges.

Sections 4018.1 and 4019 of the Penal Code provide credits for work and good behavior, respectively, to all prisoners confined in county or city jails who meet the conditions specified

Letter Opinion No. 76-48

Richard H. Schooler, Esq.

August 18, 1976

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therein. Both sections were amended in 1975 and the evident purpose of the amendments was to change by legislation a 1974 opinion of the Attorney General holding that the sections then in effect did not authorize such credits for presentence time. In that opinion, distinguishing the sections at hand from Penal Code Section 2900.6, the Attorney General said:

"Indeed, different concerns are involved. Section 2900.6 is, manifestly, an attempt to equalize the punitive aspects of sentences between indigents and those who can afford bail. Sections 4018.1 and 4019, on the other hand, appear to be directed to facilitating the rehabilitative aspects of the sentence" 57 Ops. Cal. Atty. Gen. 276 (1974)

The 1975 amendments placed Sections 4018.1 and 4019 on a par with Section 2900.6 in that credit is authorized for presentence time; however, the amendments failed to include the direction present in Section 2900.6 (and its companion Section 2900.5) that time in custody on an unrelated charge shall not be counted. In Sections 2900.5 and 2900.6 the legislative purpose was manifestly to equalize the conditions of sentencing between those on bail and those in custody; for this reason the credits therein authorized are granted only against the sentence and not against confinement as a condition of probation. However, the purpose of Sections 4018.1 and 4019 was to provide prisoners with an incentive to work and to behave satisfactorily and, in fact, those sections authorize credits against any "period of confinement" whether under sentence or a condition of probation.

Where the purpose is to equalize sentences between those who can or cannot make bail, denial of credit for time in custody on an unrelated charge, for which no sentence was imposed, is a rational means of effectuating the purpose. However, where the purpose is to encourage socially acceptable behavior and preserve a peaceful environment, it is not reasonable to extend credits to certain types of presentence custody but not to others.

Richard H. Schooler, Esq.

August 18, 1976

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Therefore, in my opinion the omission of the limiting language of Sections 2900.5 and 2900.6 in the amendments to Sections 4018.1 and 4019 was significant and was intended to permit "good time" and "work time" credits against the sentence eventually imposed for all continuous periods prior thereto, when such credits have been earned by the prisoner.

Very truly yours,

DMS

THOMAS M. O'CONNOR
City Attorney

September 3, 1976

Mr. Bernard Orsi
General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco, Calif.

MAR 13 1978

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Subject: Application of Veterans Preference
Charter Amendment to Examinations
Commenced Prior to its Effective Date

Dear Mr. Orsi:

On June 8, 1976, Proposition H was approved by the electorate, thereby amending Charter Section 8.324 with respect to veterans preference in Civil Service examinations. The Charter amendment became effective on July 13, 1976, upon filing of the election results with the Secretary of State.

In brief, Proposition H significantly changed the existing veterans preference scheme. Proposition H reduced the numbers of persons able to claim the preference while, at the same time, eliminating veterans credits on promotional examinations. However, the amendment did not address the subject of how it was to be applied to examinations already underway on the effective date of the amendment. Therefore, you have inquired concerning the effect of the Charter amendment on the examination process in general, requesting an opinion determining at what point in the selection process the new veterans preference provision becomes controlling.

Charter Section 8.324 before it was amended by Proposition H provided in relevant part as follows:

"Veterans with thirty days or more actual service, and widows of such veterans, who became eligible for appointment by attaining the passing mark in any entrance examination, shall be allowed an additional credit In the case of promotive examinations, when the passing mark has been attained, a credit . . . shall be allowed" (Emphasis added.)

The emphasized language above was retained in Section 8.324 as amended with respect to entrance but not promotive examinations. A reading of this language disclosed an intent by the voters both before and after Proposition H to trigger

Mr. Bernard Orsi

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September 3, 1976

application of the veterans preference only upon the successful completion by an applicant of the examination process. Only upon the happening of this contingency does a right to a preference arise in an otherwise qualified veteran.

Statutory enactments are not to be interpreted to have a retroactive effect unless such intention is expressly set forth in the enactment. Hopkins v. Anderson, 218 Cal. 62 (1933); Neuber v. Royal Realty Co., 86 Cal.App.2d 596 (1948); Tevis v. City and County of San Francisco, 43 Cal.2d 190 (1954). Though the authority exists whereby the framers of a Charter amendment could provide for retrospective application, such application cannot interfere with or substantially affect vested rights. McBarron v. Kimball, 210 Cal.App.2d 218 (1962).

In the present case, Proposition H does not provide for nor admit to a retroactive interpretation. Therefore, only persons having "vested rights" under the former language of Charter Section 8.324 cannot be affected by the amendment.

The concept of "vested" versus "contingent" rights is dependent on the view of the court in the particular case with respect to whether "property" interests exist and whether such interests should be deemed "substantial." Thus the term "vested right" is frequently defined as follows in City of Los Angeles v. Oliver, 102 Cal.App. 299, 310 (1929):

"A 'vested right,' as that term is used in relation to constitutional guaranties, implies an interest 'which it is proper for the State to recognize and protect, and of which the individual could not be deprived arbitrarily without injustice'." (Citation omitted.)

See also Strumsky v. San Diego County Empl. Retire. Assn., 11 Cal.3d 28 (1974); Bixby v. Pierno, 4 Cal. 3d 130 (1971) (a right is vested when the person already possesses it; not merely an expectancy); Turner v. Board of Trustees, 16 Cal.3d 818 (1976) (a probationary teacher lacks a vested interest in continued employment).

In the case of In re Dos Cabezas Power District, 498 P.2d 488 (Ariz. 1972), the court pointed out that a nonvested or contingent right is one that depends "upon the continued existence of the present condition of things until the happening of some future event." A vested right, on the other hand, was one in which a person had a present interest, where no future contingencies were relevant to the enjoyment of the interest.

Mr. Bernard Orsi

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September 3, 1976

Applying these concepts to the question of veterans preference requires a determination of when, if at all, a person gains a vested interest in the veterans credit. Upon examining the language of the Charter section, it is evident that the only qualification upon which a veterans preference is contingent (aside from qualifications as a veteran, claiming said status in a timely fashion, etc.) is whether the person has "become eligible for appointment by attaining the passing mark in any entrance (or promotive) examination." If a person had attained a passing mark on an entrance or promotive examination prior to the effective date of Proposition H, then he has a present interest in receiving veterans preference. If he had merely commenced the examination procedure prior to July 13, 1976, but had not attained a passing mark by that date, then he has only an expectancy that conditions will remain unchanged, an interest that can be abrogated by Proposition H.

If an examination was announced prior to July 13, 1976, but nothing more had occurred, the conduct of the selection process would be governed by the new language of Section 8.324. On the other hand, if the selection process were finished before July 13, and all that remained was the adoption of an eligible list, then the former veterans preference provision would control. Unless all phases of the selection process that affect the "passing mark" therein have been completed prior to July 13, then veterans preference is as set out in Section 8.324, as amended by Proposition H. These same analytical principles were utilized in Opinion No. 76-41 with respect to oral board composition for the Q-35 Assistant Inspector examination.

Therefore, Proposition H governs all examinations, entrance or promotive, in which any phase thereof affecting the passing mark had not been completed prior to July 13, 1976. You are so advised.

Very truly yours,

PSW

THOMAS M. O'CONNOR
City Attorney

June 10, 1976

Mr. Thomas Scanlon
Office of the City Treasurer
Room 110, City Hall
San Francisco, California 94102

MAR 13 1978

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Subject: Procedures Necessary for the Treasurer to Utilize
the Provisions of Government Code Section 27013
for Operating Expenses

Dear Mr. Scanlon:

This is in response to your letter of February 3, 1976 inquiring as to whether you may make use of the extraordinary provisions of Government Code Section 27013, which allow a deduction from interest for administrative costs.

You have advised me that you lack funds to repair office machines, pay overtime and make long distance telephone calls. It is your opinion that the total operation of your office comes within the scope and intent of Section 27013.

Government Code Section 27013 was adopted in 1963. The entire section reads as follows:

"§ 27013. Deduction of administrative cost from interest or income. Notwithstanding any other provisions of law, any treasurer, or other authorized county officer, who invests, deposits or otherwise handles funds for public agencies for the purpose of earning interest or other income on such funds as permitted by law, may deduct from such interest or income, before distribution thereof, the actual administrative cost of such investing,

Mr. Thomas Scanlon

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June 10, 1976

depositing or handling of funds and of distribution of such interest or income. Such cost reimbursement shall be paid into the county general fund."

As a general proposition, the general control of City and County financial affairs is in the Board of Supervisors. Charter Section 6.205. The final budget is adopted prior to the tax levy. The estimate of expenditures generally constitutes the appropriations, although Charter Section 6.205 does provide for a budget of expenditures in excess of estimated revenues.

Except as otherwise provided by law, the Board and each county official is limited in the making of expenditures or the incurring of liabilities to the amount of the appropriations allowed by the budget. Government Code Section 29120.

Government Code Section 27013 appears to be one of the exceptions recognized in Section 29120 to the general propositions of law set forth immediately above.

Section 27013 refers to "administrative cost" without defining it. In Powell v. City and County of San Francisco (1944) 62 Cal.App.2d 291, the California Court of Appeal stated at page 298 that the term "operating expenses" is not limited to physical maintenance. In other jurisdictions, the term "administrative expenses" has been defined to include such wide-ranging items as telephone expenses, salaries, expenses of office equipment and supplies. (See Leonard v. S.G. Frantz Co., 49 N.Y.S.2d 329 and State ex rel Ray v. South, 198 N.E.2d 919, 924; Also see In re Los Angeles Lumber Products Co., D.C. Cal., 46 F.Supp. 95, 98, holding attorney's fees to be administrative expenses.)

In any event, I am of the opinion that the plain and reasonable meaning of Government Code Section 27013 is that the costs associated with such items as office machine repair, overtime and long distance telephone calls are "administrative costs." I have in mind that you have advised us that the three items mentioned above are essential for the proper functioning of the Treasurer's Office.

Mr. Thomas Scanlon

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June 10, 1976

However, it must be remembered that the Treasurer of the City and County of San Francisco is both county treasurer and city treasurer, and holds both county funds and city funds. Accordingly, Section 27013 of the Government Code cannot constitute an authorization to make deductions from interest on deposit for administrative expenses from funds derived by the city in its municipal capacity. In each case, therefore, it will be necessary for the Treasurer to determine whether the deposit was a city fund or a county fund, a some time difficult determination.

Furthermore, the authorization provided by Section 27013 of the Government Code would be subject to such limitations as are imposed by Section 6.311 of the Charter, which requires that interest on funds created for specific purposes be credited to such funds.

Regarding procedures, I suggest that the necessary funds be transferred from funds under your control to the general fund, as provided for in Government Code Section 27013. Since all expenditure accounts are subject to appropriation by the Board of Supervisors, you may then request the Board of Supervisors to appropriate those funds for the purposes mentioned above.

In brief, the most the Treasurer could do would be to earmark the interest on deposits which could legally be subject to the provisions of Section 27013 and then seek an appropriation of the earmarked funds to his office for the administrative costs.

Very truly yours,

GEK

THOMAS M. O'CONNOR
City Attorney

September 30, 1976

Honorable George R. Moscone
Mayor
200 City Hall
San Francisco, Calif.

MAR 13 1978

DOCUMENTS DEPT.
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Subject: Amendment to Annual Appropriation
Ordinance; Veto Powers of Mayor
With Respect Thereto

Dear Mayor Moscone:

This is in response to your recent request for an opinion as to the veto powers of the Mayor with respect to the Amendment to the Annual Appropriation Ordinance prepared pursuant to the provisions of Section 1.19 of the San Francisco Administrative Code.

Section 1.19 of the San Francisco Administrative Code reads in part as follows:

"As a prerequisite to the levying of a tax pursuant to section 6.208 of the charter, the controller is further authorized and directed, concurrently and in conjunction with the submission of the annual tax rate ordinance, to prepare and submit to the board of supervisors, without reference or amendment to the annual budget, an amendment to the annual appropriation ordinance to effect necessary adjustments pursuant to section 6.208 of the charter and other requirements."

Section 2.302 of the Charter sets forth the powers and duties of the Mayor in the legislative process and provides, in part, as follows:

". . . The mayor shall either approve each resolution or ordinance adopted by the supervisors by signing and returning same to the clerk of the board within the time limit, or he shall disapprove and veto any resolution or ordinance, or veto or reduce any separate appropriation item therein and shall return each such

Hon. George R. Moscone

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September 30, 1976

resolution or ordinance to the clerk of the board with his written objections within the time limit. . ." (Emphasis added.)

In view of the foregoing, it is my opinion that the Mayor may veto the Amendment to the Annual Appropriation Ordinance in toto or he may veto or reduce any separate item therein.

Very truly yours,

RAK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

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Letter Opinion No. 76-52

October 6, 1976

MAR 13 1978

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Mr. John J. Spring
General Manager
Recreation and Park Department
McLaren Lodge, Golden Gate Park
San Francisco, California 94117

Subject: Advertising on Park Lands

Dear Mr. Spring:

This is in response to your letter of September 10, 1976, requesting advice as to whether advertising is permitted on park property owned by the City and County of San Francisco.

I have reviewed the materials attached to your letter. It is my understanding that the proposal under consideration by the Recreation and Park Department would involve the installation of "Teemaster units" on city-owned golf courses. These units would consist of a golf ball cleaner, tee indicator, and trash basket, all mounted on a stanchion. The units would be provided by Teemaster International Inc. in exchange for its exclusive rights to advertise on the units. Specifically, the proposal would include a requirement that pressure-sensitive decals, one foot square in area, be attached to the trash baskets. The decals would display advertisements for such products as "automobiles, soft drinks, cigarettes, fine alcoholic beverages, gasoline, tires, men's toiletries, etc." as well as for "golf equipment."

Signs located within the City and County of San Francisco are regulated under Article 6 of the City Planning Code (Part II, Chapter II, San Francisco Municipal Code).

John J. Spring

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October 6, 1976

"Sign" is defined under Section 602.18 of the City Planning Code to include

[a]ny structure, part thereof, or device or inscription which is located upon, attached to, projected or represented on any land ... which displays or includes any numeral, letter, word, model, banner, emblem, insignia, symbol, device, light, trademark, or other representation used as, or in the nature of an announcement, advertisement, attention-arrester, direction, warning or designation by or of any person, firm, group, organization, place, commodity, product, service, business, profession, or industry.

"General advertising sign" is defined under City Planning Code Section 602.7 as follows:

A sign which directs attention to a business, industry or other activity which is sold, offered or conducted elsewhere than on the premises upon which such sign is located, or to which it is affixed, and which is sold, offered, or conducted on such premises incidentally, if at all.

Insofar as the proposed "decals" would advertise such products as automobiles, alcoholic beverages and gasoline, these decals are clearly "general advertising signs" within the meaning of City Planning Code Section 602.7.

City Planning Code Section 234 provides for the designation as "Public Use Districts" or "P Districts" of all "land that is owned by a government agency and [is] in some form of public use, including open space." (emphasis added). In light of the provisions of Section 234, park lands, including golf courses, owned by the City and County of San Francisco are classified as Public Use Districts for purposes of regulation under the City Planning Code.

Section 605 of the City Planning Code provides in relevant part that "[n]o general advertising sign shall be permitted" in Public Use Districts. In view of the unqualified prohibition

John J. Spring

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October 6, 1976

against general advertising signs in park lands owned by the City and County of San Francisco, you are advised that, insofar as the subject proposal requires the City to agree to erect advertisements supplied by Teemasters International Inc. of the type described above, this proposal would be in clear violation of the Municipal Code.

Very truly yours,

DH

THOMAS M. O'CONNOR
City Attorney

October 8, 1976

MAR 13 1976

DOCUMENTS DEPT.
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Mr. Gilbert H. Boreman
Clerk of the Board
Board of Supervisors
235 City Hall
San Francisco, CA 94102

Subject: Proposed Initiative Charter Amendment
Relating To Election of Supervisors
By Districts; Effect upon Present Pro-
cedure for Recall of Supervisors

Dear Mr. Boreman:

This is in response to your letter of September 29, 1976 wherein you request my opinion as to what effect passage of the proposed initiative Charter amendment relating to the election of members of the Board of Supervisors by districts would have on the present procedures for the recall of Supervisors.

With respect to the recall of any elective officer, including members of the Board of Supervisors, the applicable provisions of the Charter presently provide as follows:

1. All provisions of the general laws of the State respecting recall petitions and elections shall be applicable to the City and County except as otherwise provided in the Charter. (Charter Section 9.103)

Mr. Gilbert H. Boreman

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October 8, 1976

2. Any elective official, the Chief Administrative Officer, the Controller or any member of the Board of Education or Public Utilities Commission may be recalled by the electors. The procedure to effect such recall shall be as follows:

A petition demanding the recall from office of the person sought to be recalled shall be filed with the Registrar. Said petition shall contain a statement of the grounds on which the recall is sought. Any insufficiency of form or substance in such statement shall in no wise affect the validity of the election and proceedings held thereunder. No recall petition shall be filed against any officer until he has held his office for at least six (6) months. (Charter Section 9.108)

3. If the petition accompanying a proposed recall be signed by registered voters equal in number to ten percent (10%) of the entire vote cast for Mayor at the last preceding general municipal election and contains a request that said recall be submitted forthwith to a vote of the electorate at a special election, then the Registrar shall forthwith call a special election, which shall be held at a date not less than sixty (60) nor more than seventy-five (75) days from the date of calling the same, at which said recall shall be submitted to a vote of the electorate, unless within sixty (60) days of a general or primary election, in which event it shall be submitted at such general or primary election. (Charter Section 9.111)

Mr. Gilbert H. Boreman

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October 8, 1976

4. If the official proposed to be removed at any recall election shall, as the result of said election, be recalled, the Mayor shall appoint his successor for the unexpired term and the officer so recalled shall be ineligible to hold any City and County office for two (2) years; should said officer be retained in his office, he shall be reimbursed out of the special election fund for his expenses in such recall election; provided that such payment shall not exceed the amount he is permitted to spend under the Purity of Elections Act now in effect. (Charter Section 9.113)

With respect to recall procedures, the proposed initiative Charter amendment provides in part:

" . . . The city and county is hereby divided into eleven supervisorial districts as hereinafter set forth, and, commencing with the general municipal election in 1977, and continuing thereafter until new districts are established as hereinafter set forth, such districts shall be used for the election or recall of the members of the board of supervisors . . . " (Emphasis added) (Sec. 2.100)

" . . . the provisions of Sections 9.108 and 9.111 of this charter, relating to recall of elective officials, shall not apply to the . . . recall of members of the board of supervisors, but provisions for the foregoing shall be set forth in an ordinance which shall be adopted by the board of supervisors pursuant hereto, . . . " (Sec. 9.100)

In view of the foregoing it is my opinion that passage of the proposed initiative Charter amendment would have the following effect upon the present procedure for the recall of Supervisors:

Mr. Gilbert H. Boreman

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October 8, 1976

The provisions of Sections 9.108 and 9.111 of the Charter, relating to the recall of elective officers of the City and County would have no application to members of the Board of Supervisors. Rather, provisions for the recall of any member of the Board of Supervisors would be prescribed in an ordinance which the Board of Supervisors would have a mandatory duty to enact. The provisions of State law with respect to the recall of elective officers would be applicable to the members of the Board of Supervisors except as otherwise provided by the ordinance enacted by the Board of Supervisors pursuant to the provisions of Section 9.100 as amended by the initiative Charter amendment referred to herein. The provisions of Section 9.113 of the Charter, as they now read, would continue to be applicable to members of the Board of Supervisors.

You are advised accordingly.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

JJS

October 18, 1976

MAR 13 1978

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Rai Y. Okamoto
Director of Planning
Department of City Planning
100 Larkin Street
San Francisco, CA 94102

Subject: Legality of Non-Permanent Civil Service
Employees Taking Promotional Examinations

Dear Mr. Okamoto:

I have received two related inquiries from your department with respect to the legality of permitting non-permanent employees to participate in promotional examinations. This response is to both letters.

In the letter from your Administrative Secretary he explains that fiscal considerations have brought about the "freezing" or "defunding" of certain budgeted permanent positions in the Department of City Planning. Therefore certain persons have been certified temporarily from eligible lists to classifications in which they otherwise could have expected permanent calls. In your subsequent letter you point out that the department utilizes a number of federally-funded employees occupying limited tenure positions. You further observe that present Civil Service Commission Rule 9.04 restricts promotional tests to employees having permanent status in the designated next lower rank or ranks.

Two distinct questions are presented by your inquiries. The first is whether authority exists in the Charter that would prohibit non-permanent employees from participating in promotional examinations.

Rai Y. Okamoto

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October 18, 1976

The second question is whether the Civil Service Commission is authorized under the Charter to amend its present Rule 9.04 to permit non-permanent applicants to take promotional examinations.

With respect to the first question, it would be helpful to first review the definitions of permanent and temporary employees, then examine the basic policy bases of a civil service system, and finally analyze relevant provisions of the Charter relating to promotional examinations.

The term "permanent" employee is not expressly defined in the Charter. However that term figures prominently in several Charter provisions. For example, Section 8.328 provides that permanent employees who miss promotional tests because of military leave may subsequently take a similar test so as not to be disadvantaged. Non-permanent employees may not claim this benefit conferred by the Charter. Similarly, in Section 8.351, only permanent employees may qualify for transfer occasioned by technological advances or automation that results in lay-offs. With regard to the uniformed forces, Section 8.327 restricts promotion to the "next lower civil service rank attained by examinations. . .," impliedly prohibiting promotion of employees temporarily occupying a next lower rank.

In Opinion No. 69-87, the phrase "regular full-time permanent employee" was defined for purposes of the salary standardization ordinances as follows: a

"regular full-time permanent employee is one who has been appointed to a full time position from a list of eligibles and has completed his probationary period. Employees under temporary certification and limited tenure certification are therefore not included."

That definition is appropriate for the Charter term "permanent" employee as well. Section 8.329 authorizes the Civil Service Commission to determine whether a particular position is, in character, "temporary, seasonal or permanent. . ." Further, Section 8.340 provides that any person appointed to a permanent position shall undergo a probationary period evaluation. The section concludes:

Rai Y. Okamoto

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October 18, 1976

"Immediately prior to the expiration of the probationary period the appointing officer shall report to the civil service commission as to the competence of the probationer for the position, and if competent, shall recommend permanent appointment." (Emphasis added.)

Civil Service Commission Rule 2, Section 2.18 defines a permanent position as:

"A position enumerated in the Annual Salary Ordinance for which funds have been provided on a continuing basis. . . ."

Therefore an employee is "permanent" under the Charter when appointed from an eligible list to a position regularly funded by the City, or declared permanent by the Civil Service Commission, and after having successfully completed a probationary period in the particular position.

In addition to the above provisions, it is necessary to examine the public policy rationale supporting the civil service system itself. It has been said that civil service primarily seeks to ascertain fitness and merit for office, while at the same time avoiding the so-called "spoils system" by assuring employees of continuance in office regardless of the party in power. The civil service system also seeks to provide the opportunity "for promotion as a reward for faithful and honest" service. Allen v. McKinley, 18 Cal.2d 697, 705 (1941); Almasy v. Los Angeles County Civil Service Comm., 34 Cal.2d 387, 404 (1949).

Charter Section 8.326 addresses the general subject of promotional examinations. While it does not explicitly restrict such examinations to permanent employees, it must be read together with the above-cited sections as well as interpreted consistent with the policy rationale underlying the civil service system itself.

In answering your first question, then, it is my opinion that the Charter does not permit temporary employees to take promotive examinations. Such employees have not demonstrated their qualifications, merit and fitness in the lower classification in order to permit promotion. They have secured temporary appointments without undergoing a competitive examination therefor, raising a spectre of

Rai Y. Okamoto

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October 18, 1976

the spoils system. To permit such employees to participate in promotive examinations would also disadvantage permanent employees competing for the same positions who have demonstrated their faithful and honest service, meriting the opportunity to promote. Lastly, temporary employees are not subject to the formalities of a probation period such that their competence has not been objectively established as required by the Charter.

Nor is this opinion affected by the fact that certain employees receiving temporary calls in the lower classification came off civil service eligible lists. As you know, highly ranked persons on eligibility lists frequently decline to accept temporary calls because it may require leaving another permanent job. Therefore, people working on temporary calls from eligible lists are often from lower ranks thereof. They should not be advantaged by the fortuitousness of their position and be permitted to take promotive examinations. Such a situation would be inherently unfair and destructive of the intent behind the civil service system as embodied in the Charter. In addition, again, such employees do not undergo a probationary period evaluation that affirmatively establishes the competence necessary for promotion.

With respect to limited tenure employees, my opinion is the same as above. None of the safeguards of the civil service merit system described in this opinion apply to such employees. As Section 8.331 of the Charter provides, the limited tenure employee classification is to be resorted to only in situations where regular examination procedures are unavailable. Moreover that section also expressly provides that:

"Persons serving under limited tenure appointments as in this section provided shall by reason of such service acquire no right or preference to permanent civil service status as defined elsewhere in this charter or by rule of the civil service commission which is conferred on persons completing probationary appointments made from lists of eligibles. . ."

To permit such employees to participate in promotive examinations would conflict expressly with Section 8.331 as well as the principles of the civil service system outlined above.

Rai Y. Okamoto

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October 18, 1976

In answer to your second question, it is my opinion that the Civil Service Commission consistent with the views expressed herein could not amend its rules to permit temporary or limited tenure employees to participate in promotive examinations.

You are so advised.

Very truly yours,

PSW

THOMAS M. O'CONNOR
City Attorney

October 20, 1976

MAR 13 1978

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Mr. James F. Wurm
Assistant General Manager,
Personnel
Civil Service Commission
151 City Hall
San Francisco, CA 94102

Subject: Status Of Benefits For Nonstriking
City And County Employees Who Were
Prevented From Working Because
Services Were Discontinued Due To
Illegal Strike By Other City And
County Employees

Dear Mr. Wurm:

This is in reply to your recent inquiry concerning the loss of benefits by certain employees due to the recent strike by craft and other employees against the City and County. In particular, there were apparently some employees who were not affiliated with any unions and desired to continue working but were unable to do so because a board or commission was forced to cease the operations of certain departments due to an insufficient work force or possible violence because of illegal picket lines.

Under these circumstances it is alleged that the affected employees lost not only the wages they could have earned but were deprived also for the period they could not work of accrual of sick leave and vacation and time in service for retirement benefits.

Mr. James F. Wurm

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October 20, 1976

The Charter grants authority to boards and commissions to regulate the conduct of their affairs and distribution and performance of their business. (Section 3.500) Department heads are also granted the authority to reduce the work force under his or her jurisdiction to conform to the needs of the work for which he or she is responsible. (Section 3.501)

During the strike in question, some departments may have experienced the situation where an overwhelming majority of the department's employees were on strike or honoring the strikers' picket lines but where a few employees were willing to work and to cross said picket lines. In those departments where it was impossible, infeasible, uneconomical or posed a danger to employees to operate at less than full manning, a board, commission or department head was, in my opinion, acting within his or her authority to close down the department's operation and inform all concerned employees not to report to the job site.

When for a valid reason there is no work required of an employee, it necessarily follows that said employee is not entitled to remuneration. Section 8.400(g) of the Charter provides that "No officer or employee shall be paid for greater time than that covered by his actual service; . . ." The fact that the employee was ready and willing to go to work and render service is of lesser significance than the fact that the City and County has no work for him or her to perform.

Accruals of sick leave, vacation and retirement benefits require an examination of Charter provisions, Ordinance and Civil Service Rules.

Sick Leave Benefits: Charter Section 8.363 delegates to the Civil Service Commission the authority to provide for leaves of absence due to illness or disability not to exceed six (6) months. Civil Service Commission Rule 23.07(a) provides that employees shall be credited with earning thirteen (13) working days of paid sick leave per completed year of paid service. The rule contains a proviso that such earned sick leave shall be credited on a prorata basis based upon the completion of regularly scheduled paid service for the

Mr. James F. Wurm

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October 20, 1976

employees' classification. It is clear under this rule that sick leave credits cannot be earned while the employee is not being paid because of lay off or leave of absence.

Vacation Allowance: Under Administrative Code Section 16.11 a vacation allowance must be reduced by one-twelfth (1/12) of the annual vacation allowance for each twenty-six (26) accumulated working days of absence without pay since the last vacation. There is a proviso to the section that no reduction shall be made for the first fifty-two (52) working days of absence without pay while on any authorized leave, nor for any period in which an employee is absent due to suspension or workers' compensation. Inasmuch as any employee laid off because of the strike was back at work within a period of less than fifty-two (52) working days, and because such a lay off is the equivalent of authorized leave, any such employee must be credited with vacation allowance as though he or she had worked during the period of lay off.

Retirement: Charter Section 8.509(G)(1) provides, for miscellaneous employees, that the time in service to be included in determining whether a member qualifies for retirement and for calculating benefits is that time during which the employee is a member of the retirement system and for which he or she is entitled to be paid for services. Administrative Code Section 16.29 reinforces the Charter definition by stating ". . . for the purposes of the Retirement System a member shall be considered as being in the city service only while he is receiving compensation from the city for the service. . ." Miscellaneous employees, therefore, can earn retirement credit only during periods of paid service.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

MMH

October 22, 1976

MAR 13 1978

Mrs. Margaret G. Maguire
Acting Clerk of the Board
235 City Hall
San Francisco, CA 94102

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Subject: Your File No. 172-76
Legislation Calling Special
Election For Submission Of
Proposed Charter Amendment
To The Electorate

Dear Mrs. Maguire:

This is in response to your letter of October 7, 1976 wherein you request legislation be drafted providing for a special election to be held for the purpose of submitting a proposed Charter Amendment amending Section 8.404 of the Charter, relating to salaries and benefits of carmen, to the electorate.

With respect to the power of the Board to call a special election, Section 9.103 of the Charter provides, in part, as follows:

" . . . Special municipal elections shall be called by the registrar when required by this Charter on the filing of appropriate initiative, referendum or recall petitions, as provided by this Charter, and may be called by the supervisors for bond issues, declarations of policy, or for the voting on candidates for city and county offices not subject to election at general municipal elections. . . ."
(Emphasis added)

Mrs. Margaret G. Maguire

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October 22, 1976

With respect to the power of the Board to call a special election on a proposed amendment to the City and County Charter, Section 34459 of the Government Code provides, in part, as follows:

" . . . The Charter of a city and county may be amended . . . by proposals submitted by the governing body or by a petition signed by 10 percent of the qualified electors of the city and county, computed upon the total number of votes cast in the city and county for all candidates for Governor at the last general election at which a Governor was elected, or both. Such proposals shall be submitted to the electors at either a special election called for that purpose or at any general or special election." (Emphasis added)

Thus, with respect to the power of the Board of Supervisors to submit a proposed Charter Amendment to the electorate at a special election, there is a clear conflict between the Charter of the City and County and general law. The general law, as illustrated by the provisions of Section 34459 of the Government Code, supra, clearly authorizes the Board of Supervisors to submit a proposed Charter Amendment at a special election. On the other hand, the provisions of Section 9.103 of the Charter, supra, clearly prohibit the Board's calling a special election except for the purposes recited therein.

Heretofore, it has been the consistent advice of this office that the provisions of general law as set forth in Sections 34450, et seq., of the Government Code prevailed over the provisions of Sections 9.100, et seq., of the Charter with respect to matters relating to proposed Charter Amendments. (See: City Attorney Opinions, Nos. 73-25, 74-42 and 74-63.)

Mrs. Margaret G. Maguire

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October 22, 1976

However, on September 3, 1976 the San Francisco Superior Court issued a minute order declaring its intention to grant a preliminary injunction enjoining the Registrar of Voters from refusing to place an initiative Charter Amendment upon the November 2, 1976 ballot if the petition relating to said initiative measure had the number of signatures required by the provisions of the Charter of the City and County rather than the number of signatures required by the Government Code. (District Election of Supervisors Committee for 5% v. O'Connor, San Francisco Superior Court No. 710 066.) In effect, the Court's order finds that the provisions of the Charter with respect to proposed Charter Amendments prevails over the provisions of general law. It is our intention to appeal this decision but, in the meantime, the power of the Board of Supervisors to call a special election to submit a proposed Charter Amendment to the electorate will remain open to question and possible legal challenge. For this reason, I have not prepared the legislation requested herein but will await your further advice in this regard.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

October 25, 1976

MAR 13 1978

Mrs. Richard Caesar
Chairman
Juvenile Justice Commission
375 Woodside Avenue
San Francisco, CA 94127

DOCUMENTS DEPT.
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Re: Authority of Member of Grand Jury to
Resist Disclosure of Testimony

Dear Mrs. Caesar:

You have indicated that the Juvenile Justice Commission has conducted a public hearing to inquire into reports on the San Francisco Juvenile Court and its facilities issued by the 1975-76 Civil Grand Jury and at that hearing a member of the Civil Grand Jury who was signatory to one of the reports and who was under subpoena issued by the Juvenile Court, refused to give testimony, except as to reference to the published reports, in reliance upon Section 924.1, 924.2 and 924.3 of the Penal Code. Consequently you have asked for my opinion as to whether the enumerated sections of the Penal Code permit a member of the Civil Grand Jury to refuse to disclose testimony, written or oral, upon which said Grand Jury relied in the issuance of the reports concerning the San Francisco Juvenile Court and its facilities.

It is a misdemeanor for a Grand Juror wilfully to disclose any evidence adduced before a Grand Jury, or anything that he himself or any other member of the Grand Jury has said, or in what manner he or any other Grand Juror has voted on a matter before the Jury, except when required by a court. (Penal Code Section 924.1). Each Grand Juror is duty bound to keep secret whatever he or any other Grand Juror said or in what manner voted on a matter before them, except

Mrs. Richard Caesar

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October 25, 1976

that a court can require a Grand Juror to disclose testimony of a witness for the purpose of determining whether it is consistent with that given by the witness before the court or where there is a charge of perjury against the witness in giving his testimony. (Penal Code Section 924.2) And a Grand Juror cannot be questioned about anything he may say or any vote he may make in the Grand Jury relative to a matter legally pending before the Jury, except if he is guilty of perjury in making an accusation or giving testimony to his fellow jurors. (Penal Code Section 924.3) Thus, it appears clear under the Penal Code that a Grand Juror cannot disclose the deliberations, testimony or vote of his Grand Jury, apart from the narrow exceptions contained in same sections of the Penal Code, none of which are applicable here based upon the information contained in your letter of inquiry.

In 53 Ops. Atty. Gen. 200 the Attorney General opined that the statutory scheme governing the disclosure of testimony taken before a Grand Jury would not allow such testimony to be either made public or be turned over to a governmental agency where no formal charge has been made even if a report had been published. As stated by the Attorney General (pp.202-203):

"Thus, if the Grand Jury wishes to call the attention of the Joint Legislative Committee on Ethics to a problem which it feels requires legislation, it may do so by an appropriate report. It may not, however, provide the Committee with a transcript or the testimony presented to it, nor may that transcript be made public."

I am in accord with the opinion of the Attorney General.

You are advised, therefore, that members of the Civil Grand Jury, whether empaneled or discharged, under the Penal Code Sections cited, cannot be compelled to disclose to the Juvenile Justice Commission testimony upon which it relied in the preparation of Grand Jury reports regarding the San Francisco Juvenile Court facilities.

Very truly yours,

EAB

THOMAS M. O'CONNOR
City Attorney

October 26, 1976

MAR 13 1978

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Honorable Henry R. Rolph
Presiding Judge
Superior Court of California
City and County of San Francisco
465 City Hall
San Francisco, CA 94102

Subject: Additional Grand Jury; Powers Under
Penal Code To Issue Reports Of Its
Investigations

Dear Judge Rolph:

You have asked for my opinion on several matters concerning the jurisdiction and powers of the additional grand jury impanelled pursuant to Section 904.6 of the California Penal Code.

Your first inquiry is whether the additional grand jury has the power to issue reports concerning its investigations.

Penal Code Section 904.6 authorizes the impanelment of an additional grand jury in a city and county, which grand jury, by subdivision (d) of said section, is authorized to inquire into any matters which are subject to grand jury inquiry and is granted the exclusive jurisdiction to return indictments.

In Monroe v. Garrett (1971) 17 Cal.App.3d 280, the grand jury investigated three (3) criminal cases involving large numbers of public offenses committed on college and high school campuses and returned indictments; trial was had, and numerous defendants were found guilty of various charges. Subsequent to the investigation the grand jury issued a lengthy report and press release. Plaintiff was a taxpayer who sought reimbursement to the county for the amounts spent in making certain

Honorable Henry R. Rolph

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recommendations in the grand jury's report and press release pertaining to an educational opportunity program and the administration of colleges and high schools on the contention that the expenditures were beyond the authority of the defendants as grand jurors. The court held that the acts of the grand jurors in making the report were not beyond their authority as grand jurors because the report and recommendations arose out of a legitimate investigation into criminal activity on the campuses, stating at page 283:

"The grand jury may inquire into all public offenses committed or triable within the county. (Pen.Code, Sec. 917; People v. Beatty (1860) 14 Cal. 566.) Although the grand jury should not engage in fishing expeditions of its own, the Attorney General has the authority to direct the grand jury to investigate matters of public interest. (Pen.Code, Sec. 923; (1962) 2 Santa Clara Law. 78, 82; see also Samish v. Superior Court (1938) 28 Cal.App.2d 685 [85 P.2d 305].) Even if the grand jury cannot initiate investigations and make recommendations it can investigate and make recommendations if the investigation grows out of legitimate inquiry into criminal or corrupt activity. ((1964) 52 Cal.L.Rev. 116, 122, 123.)"

Of reports by a grand jury, the court went on to say at page 284:

"In our system of government, a grand jury is the only agency free from possible political or official bias that has an opportunity to see the picture of crime and the operation of government relating thereto on any broad basis. It performs a valuable public purpose in presenting its conclusions drawn from that overview. The public may, of course, ultimately conclude that the jury's fears were exaggerated or that its proposed solutions are unwise. But the debate which reports, such as the one before us, would provoke could lead only to a better understanding of public governmental problems. They should be encouraged and not prohibited."

Honorable Henry R. Rolph

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Consequently, by virtue of the statutory authority granted by Penal Code Section 904.6(d) and the holding in Monroe v. Garrett, supra, I am of the opinion that the additional grand jury has the power to issue reports and make recommendations subsequent to legitimate inquiry into criminal or corrupt activity. These reports and recommendations may be issued where an indictment has been returned (Monroe v. Garrett, supra) or where there has been no indictment. Irwin v. Murphy (1933) 129 Cal.App. 713, 717-718, by way of dicta, allows a grand jury to render a report even where it has declined to indict.

Whether a report should be made where an indictment is returned is a matter in the discretion of the additional grand jury. If the additional grand jury is of the opinion that a report might prejudice either the defense or prosecution in the ensuing trial, it may determine not to issue any report, as was done by the 1965 grand jury in the matter of the Assessor. On the other hand, if the additional grand jury determines that a report is necessary to publicize a particular problem of crime and the operations of government relating thereto, it may do so.

Your second inquiry asks whether a transcript of an investigation may be prepared if no indictment is returned.

Whenever the additional grand jury is conducting an investigation into a criminal matter, a stenographic reporter must be present to report in shorthand the testimony taken. Penal Code Section 938. That reported testimony, however, is not required to be transcribed and a transcript prepared unless an indictment is returned. Penal Code Sections 938 and 938.1. Thus, the applicable statutes require a transcript where an indictment is returned but do not require or prohibit the preparation of a transcript where no indictment is returned.

If the thrust of your inquiry concerns the preparation of a transcript of the investigation for the purpose of making said transcript public or delivery to some other governmental agency, then the secrecy of grand jury testimony becomes the issue. On this point the Attorney General has

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ruled in 53 Ops.Atty.Gen. 200 that the transcript of testimony taken before a grand jury during a criminal investigation, which did not result in the return of an indictment, may neither be made public nor may it be turned over to a governmental agency. His opinion was based upon the secrecy requirement of Penal Code Sections 924.1 and 924.2. I concur in that opinion.

It would appear then, although there is no statutory prescription against preparation of a transcript of testimony where no indictment is returned, that no useful purpose would be served by the preparation of such transcript.

Your last inquiry is whether the additional grand jury may return an indictment solely for a misdemeanor.

Under Penal Code Section 917 the grand jury may inquire into all public offenses committed or triable within the county and present them to the court by indictment. Thus, indictments can only be returned for offenses which are triable in Superior Court. See Ex Parte Wallingford (1882) 60 Cal. 103.

With exceptions not pertinent here, the Municipal Court is given jurisdiction in all criminal cases amounting to misdemeanor. Penal Code Section 1462. Consequently, the Superior Court has no jurisdiction to try a misdemeanor and there is no basis for an indictment for a misdemeanor. See In re Grosbois (1895) 109 Cal. 445.

Based upon the foregoing, I am of the opinion that the additional grand jury may not return an indictment solely for a misdemeanor.

You are so advised.

Very truly yours,

THOMAS M. O'CONNOR
City Attorney

November 4, 1976

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Mr. Thad Brown
Tax Collector
107 City Hall
San Francisco, CA 94102

Subject: Applicability of Business and Payroll Expense Taxes
To Activities Occurring on Federal Property

Dear Mr. Brown:

This is in response to your question on whether or not the San Francisco Business Tax and/or Payroll Expense Tax apply to otherwise taxable business activity occurring on federal lands within the boundaries of the City and County.

The Constitution of the United States (Article 1, Section 8, Clause 11) gives to the Congress the power to exercise exclusive legislative authority over federal property necessary for the functions of the federal government. Prior to 1939 the State of California reserved only the right to serve civil or criminal process upon lands ceded to the federal government. The power to impose taxes on transactions occurring within federal lands was not retained by the state.

On March 2, 1897, the State of California ceded exclusive jurisdiction to the United States for all land then held by the federal government. In Standard Oil of California v. State of California (1933) 291 U.S. 242, 244-245; 78 L.Ed 775, the Supreme Court stated:

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"...it seems plain that by the act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio - put that area beyond the field of operation of her laws . . . A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

The Act of 1897 ceded to the United States the following lands within the City and County of San Francisco:

1. The Presidio of San Francisco (all acreage acquired by 1923);
2. Fort Mason (all acreage acquired by 1935);
3. U.S. Customs House (555 Battery Street) (Property acquired 1854);
4. Marine Hospital (Lake Street) (Exclusive jurisdiction: 1897);
5. Fort Miley Hospital (acreage acquired 1893);
6. U.S. Post Office (7th and Mission Streets) (property acquired prior to 1897);
7. Yerba Buena Island (Exclusive jurisdiction: 1897);
8. Old Mint (88 - Fifth Street) (Exclusive jurisdiction: 1868).

Section 34 of the Political Code, now Government Code Section 126(e), was amended in 1939 to reserve in the state and its political subdivisions the power of taxation on lands acquired by the United States after September 10, 1939:

Section 126(e)

"In granting this consent, the Legislature and the State grant concurrent jurisdiction on and over the land to the United States, excepting and reserving state jurisdiction on and over the land for the execution of civil and criminal process and to enforce the laws of the State of California in all cases, and the State's entire power of taxation including that of each state agency, county, city, city and county, political subdivision or public district or in the State;

Thad Brown

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and reserve to all persons residing on such land all civil and political rights, including the right of suffrage, which they might have were this consent not given."

The City and County of San Francisco, through Section 126(e), has the power to apply taxes to transactions occurring on lands in which exclusive jurisdiction vested with the United States after September 10, 1939 (the effective date of the legislation). Property falling under this category includes, among others, Treasure Island and the Federal Building at 450 Golden Gate Avenue.

The United States does permit certain taxes to be collected from transactions occurring on all federal lands, regardless of any reservation of the right to tax by the State. On July 30, 1947, Title 4, Section 106 of the United States Code was enacted. Section 106(a) permits the levying of state and local governmental income taxes on transactions occurring on federal lands within the taxing jurisdiction.

Section 106. Same; income tax

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

"(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. July 30, 1947, c.389, §1, 61 Stat. 641."

Title 4, Section 110(c) defines "income tax" to include a tax measured by gross receipts:

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"The term 'income tax' means any tax levied on, with respect to, or measured by net income, gross income or gross receipts."
(Emphasis added.)

("Person" is defined as any individual, trust, estate, partnership, association, company, or incorporation.)

The Supreme Court in Howard v. Commissioners of Sinking Fund of City of Louisville, Ky. 1953, 73 S.Ct. 465, 344 U.S. 624, 97 L.Ed 617, 621, concluded that an occupational license tax measured by gross receipts from work performed in a city is an "income tax" under Title 26, Section 106 of the United States Code:

"Thus the right is specifically granted to the City of Louisville as a taxing authority of Kentucky to levy and collect a tax measured by the income or earnings of any party receiving income from transactions occurring or services performed in such area. . . to the same extent and with the same effect as though such area was not a Federal area. In other words, Kentucky was free to tax earnings just as if the Federal Government were not there."

(See also City of Portsmouth v. Fred C. Gardner Co., Inc., Va. 1975 211 S.E. 2d 259.)

The Congress of the United States has, through the enactment of Title 26, Section 106, permitted the City and County of San Francisco to collect a gross receipts tax from persons doing business on all federal lands within the boundaries of the City and County. The Business Tax, which is measured by gross receipts is such a tax. However, the Payroll Tax ordinance is only applicable to persons doing business on property acquired by the United States after September 10, 1939.

Business activity conducted upon state lands is subject to the taxing authority of the City and County of San Francisco. In City of Los Angeles v. AEC Los Angeles (1973) 33 C.A.3d 933, the Court ruled that a business license tax is not a regulatory measure and therefore does not impinge on the sovereign power of the

Thad Brown

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state. A non-regulatory tax imposed upon business activities undertaken on state land is a tax on the person doing business with the state and not the state. Therefore, the Business Tax and Payroll Expense Tax are collectable from those doing business on state lands within the City and County of San Francisco regardless of the acquisition date of the land.

Therefore, it is my opinion that:

(1) The Business Tax, which is a license tax measured by gross receipts from business transactions within the City and County, is collectable from persons doing business on all federal lands within the City and County of San Francisco, pursuant to the provisions of Title 26, Section 106 of the United States Code; and

(2) The Payroll Expense Tax is applicable to payroll expense generated on lands acquired by the United States after September 10, 1939, (Government Code Section 126(e)) but is not applicable to payroll expense generated on federal lands acquired on or before that date.

Very truly yours,

JLL

THOMAS M. O'CONNOR
City Attorney

November 8, 1976

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Mr. S. M. Tatarian
Director of Public Works
Department of Public Works
City and County of San Francisco
260 City Hall
San Francisco, CA 94102

Subject: State High Rise Fire Regulations
(California Health and Safety
Code Section 13213)

Dear Mr. Tatarian:

This is in response to your inquiries regarding the enforcement responsibilities of the Bureau of Building Inspection under State fire regulations for existing high rise structures promulgated pursuant to Health and Safety Code Section 13213.

1. Must the Bureau of Building Inspection determine that a building conforms to State high rise structure fire regulations prior to approving a construction permit?

Section 13214 of the Health and Safety Code provides that enforcement of high rise structure fire regulations (19 Adm. Code 17.33, et seq.) "shall be enforced in the same manner as provided in Sections 13145 and 13146." These Sections provide in pertinent part that the "chief of any city or county fire department . . . and their authorized representatives shall enforce in their respective areas regulations that have been formally adopted by the State Fire Marshal."

Mr. S. M. Tatarian

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State law generally permits a local legislative body to impose a duty imposed upon one municipal officer by State law on another municipal officer who is charged with the performance of duties of the same character. (See Government Code Section 34004.) However, this general rule does not apply to local enforcement of State fire regulations because Health and Safety Code Section 13146.5 provides that such enforcement "shall not be carried out by other persons pursuant to Section 34004 of the Government Code."

Apart from the fact that State law does not permit the Board of Supervisors to reimpose duties related to enforcement of State fire regulations, the City Charter imposes the responsibility for such enforcement on the Fire Department. Charter Section 3.545 provides in part that the Chief of the Fire Department

" . . . shall hold the assistant chief of department, division of fire prevention and investigation, to the responsibility and authority for enforcement of laws and statutes of the State of California. . . pertaining to matters of fire prevention . . ."

Furthermore, Charter Section 3.545, in providing for the administrative relationship between the Fire Department and the Department of Public Works, requires that the responsibility for enforcement of State fire regulations be retained by the Fire Department even where such regulations overlap local building regulations enforced by the Department of Public Works. Charter Section 3.545 provides, in part, as follows:

" . . . the Bureau of Fire Prevention and Public Safety shall inspect all . . . premises regulated by Title 19 of the California Administrative Code . . . to determine whether or not compliance is being had with statutes, regulations and ordinances relative to fire prevention . . . [and] shall enforce said statutes, regulations and ordinances . . . [and] shall detail to the Department of Public Works such

Mr. S. M. Tatarian

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personnel as necessary to review and check plans [submitted as part of construction permit applications] relative to requirements of the Fire Code [which incorporates by implication 19 Admin. Code 17.33, et seq.] and shall report any particulars of non-compliance to the Director."

In light of the foregoing, you are advised that the Bureau of Building Inspection has neither responsibility nor authority to determine whether a building is in violation of the State high rise structure fire regulations before approving a construction permit for that building.

2. In view of the fact that Health and Safety Code Section 13213 does not provide reimbursement for costs incurred in local implementation of State fire regulations and the Board of Supervisors has not approved additional personnel, what is the legal responsibility of the Bureau of Building Inspection in not processing permits sought by owners to bring their buildings into compliance with State high rise structure fire regulations?

Absence of State Reimbursement

Authority for the enactment of ordinances regulating the issuance of building permits is contained in City Charter Section 7.704 which provides in part that the

" . . . Board of Supervisors shall regulate, by ordinance the issuance . . . of . . . permits . . . for . . . privileges which affect the . . . fire prevention [or] welfare . . . of or in the city and county . . . Such ordinance shall fix the fees or licenses to be charged."

Charter Section 6.402 provides that "[f]ees or licenses to be charged under ordinances referred to in Section 7.704 shall not be less than the cost to the city and county of regulation and inspection."

Mr. S. M. Tatarian

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In light of Charter Sections 7.704 and 6.402, the fee schedules set forth in Building Code Section 303.A, et seq., are required to cover all costs associated with the processing of construction permits. If the actual cost of processing permits exceeds the fees provided under the Building Code, the Director of Public Works, through the Chief Administrative Officer, has the responsibility for recommending that the fees be readjusted to comply with Charter Section 6.402. (See Charter Section 3.501.) In any event, insofar as permit fees are required to cover the costs involved in processing permit applications regardless of the purpose for which the application is made, you are advised that the failure of the State to provide additional funds for the purpose of implementing its high rise structure fire regulations has no bearing on the responsibilities of the Superintendent in processing permit applications made for the purpose of complying with those regulations.

Failure of Board to Approve Additional Inspectors

Section 2 of the Public Works Code (Part II, Chapter X, of the San Francisco Municipal Code) provides in relevant part that:

" . . . [i]n any case where plans and specifications are by ordinance required to be filed with an application for permit, the Central Permit Bureau shall transmit such plans and specifications to the Bureau of Building Inspection, and other departments or bureaus required to act thereon shall inspect such plans and specifications at the offices of said bureau. The Central Permit Bureau shall receive applications for permits for the following purposes and shall refer such applications or notice thereof, to departments and bureaus designated in connection with each specific purpose, each of which departments and bureaus shall approve or disapprove each such application with due diligence;

Mr. S. M. Tatarian

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"(a) Building. For the erection, alteration, reconstruction, shoring, underpinning or demolition of, or the excavation for, any building, including scaffolding required by such operations -- to the Bureau of Building Inspection . . .

" . . .

"(d) Refrigerating and Sprinkler Systems. For the installation, alteration or reconstruction of any refrigerating or sprinkler systems, fire appliances and equipment fixtures or apparatus in and for the use of any building -- to the Department of Public Health, Bureau of Building Inspection . . ."
(emphasis added)

In view of the mandatory language of Section 2, "the Bureau of Building Inspection . . . shall approve or disapprove each such application with due diligence," and the absence of any language limiting or modifying the Bureau's duty to determine whether permit applications should be approved, insufficient personnel is not a legitimate basis for the Bureau's refusal to process a permit application.

Therefore, you are advised that, to the extent that building permits are required for work done for the purpose of compliance with State fire regulations, the Bureau of Building Inspection must review required plans and specifications and must act on permit applications with due diligence. You are further advised that since the Superintendent's approval of permit applications is a prerequisite to the issuance of permits by the Central Permit Bureau (see Building Code Section 302.A), his refusal to approve a permit solely on the basis of his finding that there are insufficient inspection personnel would be tantamount to a denial of the permit application from which the applicant may appeal to the Board of Permit Appeals. (See Charter Section 7.70⁴.)

3. Insofar as the enforcement of State high rise structure fire regulations is a State-mandated program, is the Board of Supervisors required to provide additional inspection personnel in the absence of State financing of the program?

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As discussed under question 1. above, enforcement of the high rise structure fire regulations is provided under Sections 13145 and 13146 of the Health and Safety Code. Section 13145 provides as follows:

" . . . The State Fire Marshal, the Chief of any city or county fire department or fire protection district, and their authorized representatives shall enforce in their respective areas regulations that have been formally adopted by the State Fire Marshal for the prevention of fire or for the protection of life and property against fire or panic."

Section 13146 provides as follows:

" . . . The division of authority for enforcement of such rules and regulations shall be as follows:

"(a) The chief of any city or county fire department or fire protection district, and their authorized representatives, shall enforce the rules and regulations in their respective areas.

"(b) The State Fire Marshal shall have authority to enforce the rules and regulations in areas outside of corporate cities and county fire protection districts.

"(c) The State Fire Marshal shall have authority to enforce the rules and regulations in corporate cities and county fire protection districts upon request of the chief fire official or the governing body."

In view of the provision under Section 13146(c) permitting enforcement of the high rise structure fire regulations to be carried out by the State Fire Marshal at the request of either the Board of Supervisors or the Chief of Fire Prevention and

Mr. S. M. Tatarian

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November 8, 1976

Investigation, the enforcement of these regulations is not a State-mandated program such as would require the allocation of additional city or county resources to carry out inspections under the enforcement program.

4. Is any personal liability incurred by the Superintendent of Building Inspection by permitting alterations to be done in buildings subject to State high rise structure fire regulations without requiring buildings to be brought into compliance with such regulations?

Section 3.545 of the City Charter, in part, requires the Bureau of Fire Prevention and Public Safety to

" . . . examine the application, plans and specifications for . . . alterations or repairs estimated to exceed \$1,000 in cost of . . . premises regulated by Title 19 of the California Administrative Code. . . "

and

" . . . by written report, filed with the director of Public Works, approve such plans and specifications or report. . . the particulars wherein noncompliance exists, and upon modification of the application, plans and specifications to comply therewith, the bureau shall inform said director of its approval."

Charter Section 3.545 also prohibits the issuance of any permits for alteration or repair exceeding One Thousand Dollars (\$1,000.) on buildings regulated by Title 19 unless the required plans and specifications are approved by the Bureau of Fire Prevention and Public Safety.

In light of the above quoted charter provisions you are advised that if the Bureau of Fire Prevention and Public Safety were to determine that a building for which a permit application

Mr. S. M. Tatarian

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has been made for alterations exceeding One Thousand Dollars (\$1,000.00) in cost is an "existing high rise structure" as defined under Health and Safety Code Section 13210(a) and Section 13210(b) and were to determine that the building is not in compliance with Section 17.53 of Title 19 of the California Administrative Code and were to notify the Superintendent of the particulars of the noncompliance, then the Superintendent's issuance of the permit without the approval of the Bureau of Fire Prevention and Public Safety of the plans and specifications and any modifications thereof would be in violation of Charter Section 3.545. Any permit issued in violation of Charter Section 3.545 would be void.

However, the Superintendent's personal liability, if any, for approving a permit application in violation of Section 3.545 would depend on the facts and circumstances involved in a particular case. Therefore, I express no opinion on the question of the Superintendent's personal liability at this time.

Very truly yours,

DH

THOMAS M. O'CONNOR
City Attorney

November 10, 1976

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Civil Service Commission
151 City Hall
San Francisco, California 94102

Subject: Veterans' Preference, Section 8.324,
Charter, Active Military Operations
During Vietnam Conflict

Gentlemen:

This is in response to your request for my opinion on what is the effective date of the commencement of "active military operations" for the Vietnam conflict in determining eligibility for veterans' preference under Section 8.324 of the Charter.

The particular fact situation giving rise to this request concerns an eligible on civil service entrance list No. E-3 for Class 5277 Planner I which list was adopted March 24, 1976. The subject eligible requested veterans' preference for military service during the period December 27, 1961 to September 4, 1964, on which date he was honorably discharged from the U.S. Marine Corps. The Civil Service Commission rejected his request for veterans' preference on the ground that he did not serve for thirty days during a "time of war" as that term is defined in Section 8.324 of the Charter and Section 9.14(g) of the Civil Service Rules.

Section 8.324 of the Charter governs the entitlement to veterans' preference in examinations. This section was amended in June 1976, but the applicable portion of Section 8.324 was unaffected. Section 8.324 provides that honorably

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Civil Service Commission

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discharged veterans with thirty days of actual service in time of war who pass a civil service examination shall be entitled to an additional 5% credit for entrance examinations. "Time of war" is defined in Section 8.324 as follows:

"(a) The period of time from the commencement of a war as shown by any declaration of war of the Congress of the United States, or by any statute or resolution of the Congress a purpose of which is to declare in any manner the existence of a state of war, until the time of termination thereof by any truce, treaty of peace, cessation of hostilities, or otherwise.

"(b) The period of time during which the United States is or has been engaged in active military operations against any foreign power, whether or not war has been formally declared.

"(c) The period of time during which the United States is or has been assisting the United Nations or any nation or nations in accordance with existing treaty obligations, in active military operations against any foreign power, whether or not war has been formally declared.

"(d) The period of time during which the United States is engaged in a campaign or expedition in which a medal has been authorized by the government of the United States; provided, however, that no person shall be eligible for the benefits provided for veterans in this section unless he shall have been eligible to receive such a medal."

The phrase time of war is also defined in Section 9.14(g) of the Civil Service Rules. The Vietnam conflict is therein defined as:

"(4) The period of time during which the United States armed forces became engaged in active military operations in South Vietnam against North Vietnam beginning March 7, 1963, and to end with the date of cessation of such active military operations."

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The subject employee claims that he is entitled to a veterans' preference under Section 8.324(b) of the Charter because he had thirty days of actual service in a period during which the United States was engaged in assisting South Vietnam in "active military operations" against the North Vietnamese forces. Section 8.324(b) provides:

"(b) The period of time during which the United States is or has been engaged in active military operations against any foreign power, whether or not war has been formally declared."

This office has researched various authorities in order to determine when active military operations by the United States commenced in Vietnam. The United States had assigned military advisors to the South Vietnamese for several years prior to our active military involvement in Vietnam for the purpose of assisting South Vietnam in developing its army and defenses. Such U.S. involvement could not, in my opinion, be considered as "active military operations" against a foreign power by the United States. The period during which the United States had such military advisors in South Vietnam does not, therefore, come within the definition of "time of war" under Section 8.324(b) of the Charter.

In my opinion, August 5, 1964 was the date on which the United States passive role as military advisor changed to that of assuming active military operations against North Vietnam. On that date, the President sent a message to Congress advising it that U.S. naval vessels had been attacked by the North Vietnamese and that he had directed U.S. armed forces on August 5, 1964, to take retaliatory air action against North Vietnam gunboats and supporting facilities. Two U.S. aircraft were lost in that August 5th action. The President in his message to Congress detailed the chronology of events leading up to our retaliatory actions; and he requested Congress to adopt a Joint Resolution affirming the national determination that "all such attacks will be met, and that the United States will continue in its basic policy of assisting the free nations of the area to defend their freedom." (See President's message to Congress dated August 5, 1964, House Document No. 333, 88th Congress, 2d Session.)

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In response to the President's request, a Joint Resolution was introduced in Congress. Secretary of State Dean Rusk and Secretary of Defense Robert S. McNamara testified before the Committee on Foreign Affairs of the House of Representatives as to the specific events of the North Vietnamese attacks on U.S. naval vessels and of our retaliatory air strikes ordered by the President on August 5, 1964.

Secretary of Defense McNamara gave the following account of the surrounding events of this incident:

On August 2, 1964, two North Vietnam PT boats fired torpedoes at the USS Maddox, a destroyer, and it opened fire in self-defense. A third hostile PT boat also fired a torpedo and directed gun fire at the Maddox. A U.S. aircraft carrier, USS Ticonderoga, dispatched aircraft to attack the enemy PT boats. The three enemy PT boats were damaged by U.S. aircraft and artillery from the Maddox. On August 3, 1964, the President ordered that Navy patrols continue their patrols in the Gulf of Tonkin and instructed such patrols to attack any force which attacked them in international waters. On August 4, 1964, the Maddox reported radar contact with unidentified surface vessels who were paralleling that ship and her sister destroyer, the USS Turner Joy. The destroyers later reported that they were under continuous torpedo attack and were engaged in defensive counterfire. U.S. destroyers sunk two of the attacking craft. On the evening of August 4, 1964, the President, after consulting with the Congressional leadership, informed the American people of these episodes. On August 5, 1964, he ordered retaliatory U.S. military response against the North Vietnam PT and gunboats, their bases and supporting facilities. All targets were severely hit, in particular, the North Vietnamese's petroleum storage installations. Some 25 North Vietnam patrol boats were destroyed or damaged. Two U.S. aircraft were destroyed and two damaged. (See statement of Secretary of Defense Robert S. McNamara to Committee on Foreign Affairs, August 6, 1964, House Report No. 1708 which accompanied H.J. Resolution 1145.)

The Congress approved the Joint Resolution stating that whereas naval units of the Communist regime in Vietnam have deliberately and repeatedly attacked U.S. naval vessels in international waters, the Congress approves and supports the determination of the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." (House Joint Resolution 1145, considered and passed, House - August 6, 1964, Senate - August 7, 1964.)

Civil Service Commission

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November 10, 1976

August 5, 1964 has been established as the beginning date of the Vietnam conflict for federal veterans' benefits (38 U.S.C. §101(29)), California veterans' educational and loan benefits (§980 et seq., Mil. and Vet. Code) and the California property tax exemption (§205, Rev. and Tax. Code).

It appears clear from the foregoing that the United States commenced "active military operations" against North Vietnam on August 5, 1964. The subject eligible received an honorable discharge from the U.S. Marine Corps on September 4, 1964, and he therefore had thirty days actual service during a period in which the United States was engaged in active military operations against a foreign power. He is therefore entitled to veterans' preference on the entrance examination for Class 5277 Planner I in accordance with Section 8.324(b) of the Charter.

It should also be noted that on January 27, 1973, a cease fire agreement was signed between the United States and the Republic of Vietnam terminating active participation of armed forces of the United States in the Vietnam conflict. President Ford subsequently signed a proclamation that May 7, 1975 was the last day of the "Vietnam era" for purposes of certain veterans' benefits under Title 38 U.S.C. §101(29). (Presidential Proclamation No. 4373, May 7, 1975.)

In accordance with this opinion it is recommended that Section 9.14(g)(4) of the Civil Service Rules be amended to provide that August 5, 1964 is the beginning date of active military operations by United States armed forces in Vietnam and that January 27, 1973 is the cessation of such active military operations.

Very truly yours,

MCK

THOMAS M. O'CONNOR
City Attorney

November 29, 1976

MAR 13 1978

Mr. Gilbert H. Boreman
Clerk of the Board
Board of Supervisors
City and County of San Francisco
235 City Hall
San Francisco, CA 94102

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Subject: Submission Of Proposed Charter
Amendment At Special Election
Required By Charter

Dear Mr. Boreman:

This is in response to your letter of November 17, 1976 wherein you request my opinion as to whether or not, in the event a special election were to be called by reason of an initiative petition, a proposed Charter amendment might be submitted to the electorate at that same election.

While the Charter mandates that an initiative measure which meets the requirements of Section 9.111 must be submitted to the electorate at a special election called in connection therewith, it is silent as to the submission of any other measures at that same election. In such instances, it appears that the provision of Section 9.103 of the Charter which adopts the provisions of the general laws of the State respecting elections, unless otherwise provided by the Charter, would come into play. One such provision is set

Mr. Gilbert H. Boreman

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November 29, 1976

forth in Section 34459 of the Government Code which authorizes the governing body of a city and county to submit its own proposed Charter amendments "at any general or special election."

Accordingly, it is my opinion that, under the conditions set forth in your letter, the Board of Supervisors could submit a proposed Charter amendment at that same election.

Very truly yours,

JJS

THOMAS M. O'CONNOR
City Attorney

November 30, 1976

MAR 13 1978

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Richard D. Hongisto, Sheriff
City and County of San Francisco
333 City Hall
San Francisco, California 94102

Subject: Validity of Restrictions on Employee Resignations

Dear Sheriff Hongisto:

You have inquired of this office with respect to certain difficulties you have experienced in staff turnover. As you state in your letter, oftentimes deputies will be trained in the San Francisco Sheriff's Office and subsequently leave for other law enforcement agencies within a few years. This necessitates constant training of new deputies along with the continual loss of experienced deputies, all detrimentally affecting the functioning of your office.

You pose the questions in your letter: (1) may the Sheriff (or more properly the Civil Service Commission) legally bind an employee to remain with the City and County of San Francisco for a specific period, or (2) may the employee upon entering City service be required to communicate with other law enforcement agencies stating his disinclination to work for any entity other than the City and County of San Francisco?

In response to your first question, it is my opinion that it would not be possible under the law to bind a civil service employee to the City and County of San Francisco for a specific period of time. No such "agreement" could be negotiated by the Sheriff because the hiring authority for the City and County is vested by the Charter in the

Richard D. Hongisto, Sheriff

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November 30, 1976

Civil Service Commission. But even that body could not constitutionally impose upon an employee the obligation to work only for the City and County. The "right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness." Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 17 (1971). The Supreme Court further stated that "[l]imitations on this right [to work] may be sustained only after the most careful scrutiny." Sail'er Inn, supra. id.

Moreover, enforcement of any "agreement" restricting employment would be unlawful in California. No suit to force the employee to work for the City would be proper. O'Brien v. Perry, 130 Cal.526 (1900). Adams v. Williams Resorts, 210 Cal.App.2d 456 (1962). While an injunction may be proper in some cases to stop a person from working for another in violation of a contract (Lumley v. Wagner, 42 Eng. Rep.R.687 (1852)), the services contracted for must be extraordinary. If another can perform the service, then the only suit would be for damages. Such a remedy would be extremely ineffective.

With respect to your second question, no employee could be forced to communicate with other agencies to register his disinclination to leave City employment. Apart from the questionable efficacy of such a provision, it would be attempting to achieve by indirection what the employer cannot directly compel.

You are so advised.

Very truly yours,

PSW

THOMAS M. O'CONNOR
City Attorney

SF
247
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6-64

SF City Attorney

Letter Opinion No. 76-64

December 7, 1976

MAR 13 1978

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Mr. Bernard Orsi
General Manager, Personnel
Civil Service Commission
151 City Hall
San Francisco, CA 94102

Subject: Charter Section 8.407 Relating
To Prevailing Rates Of Wages
And Working Condition Benefits

Dear Mr. Orsi:

This is in response to your request for an opinion relating to the interpretation of certain language contained in Charter Section 8.407 enacted by the voters in the November 1976 election as Proposition "D". Your request asks for a clarification of three (3) portions of that Charter section.

1. Your first question asks for an interpretation of the provisions of Charter Section 8.407 as it relates to the powers and duties of the Board of Supervisors and the Civil Service Commission with regard to the fixing of wage rates.

Prior to adoption of Section 8.407 compensation of "miscellaneous employees" was fixed under the provisions of Section 8.401 of the Charter. Section 8.401 provided that when fixing salaries and wages paid to "miscellaneous employees" the Civil Service Commission was to conduct a survey, prepare schedules of compensation reflecting

Mr. Bernard Orsi

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December 7, 1976

prevailing wage rates and submit same to the Board of Supervisors as recommendations. The Board of Supervisors could approve, amend or reject the recommended schedules of compensation and were required to set compensation "in accord" with the generally prevailing rates of wages.

Section 8.407 of the Charter defines "prevailing rates of wages" by setting forth a mathematically detailed formula to be followed in order to arrive at same. The prevailing rates of wages are the rate ranges arrived at as a result of utilizing the aforementioned mathematical formula after basic pay rate data is collected by the Civil Service Commission from a survey conducted in the manner as specifically set forth in the Charter section.

It is clear that Section 8.407 places the authority in the Civil Service Commission to determine the generally prevailing rates of salaries and wages for those employees covered by Charter Section 8.401. After "rate ranges" are determined by the Civil Service Commission, the Board of Supervisors has the duty to "fix basic pay rates as close as reasonably possible to prevailing rates, provided, however, that the Board of Supervisors shall not set the maximum rate of pay for any class in excess of the maximum prevailing rate for that class."

In Collins vs. City and County of San Francisco (1952) 112 Cal.App.2d 719 and San Francisco Chamber of Commerce vs. City and County of San Francisco (1969) 275 Cal.App.2d 499, the Appellate Courts analyzed Charter Section 151 (now Section 8.401) and concluded that because under said section the Civil Service Commission's recommendation to the Board of Supervisors did not purport to bind the Board to ratify the schedules and that legislative discretion was contemplated.

Section 8.407 modifies Section 8.401 by requiring the Board of Supervisors to fix basic pay rates as close as reasonably possible to prevailing rates as determined by the Civil Service Commission. The language of Section 8.401, which the Courts have interpreted as granting the Board legislative discretion is no longer applicable.

Mr. Bernard Orsi

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December 7, 1976

It is my opinion that the language directing the Board of Supervisors to "fix basic rates of pay as close as reasonably possible to prevailing rates, provided, however, that the Board of Supervisors shall not set the maximum rate for that class" divests the Board of Supervisors of a wide discretion to fix wages and imposes a duty on the Board to select that rate of compensation which is closest to the prevailing rate as determined by the Civil Service Commission but does not exceed it. The language of Section 8.407 recognizes that the Civil Service Commission has established schedules of compensation which are included in the Salary Standardization Ordinance and that in establishing a "prevailing rate" the survey and computations involved do not insure that the "prevailing rate" would fall exactly within an established schedule. Charter Section 8.407 means that once the Civil Service Commission arrives at a "prevailing rate" the Board of Supervisors must then fix the basic rate of pay for a given classification in the schedule of compensation which is closest to the "prevailing rate" without exceeding it.

2. Your second question relates to the following paragraphs in Section 8.407 relating to the Board of Supervisors granting working condition benefits to employees:

"The board of supervisors, in its discretion, may provide working condition benefits for employees covered under this section and section 8.401 of this charter only in accordance with the following provisions:

"(a) The civil service commission must determine, certify and recommend to the board of supervisors that the working condition benefit is equitable or necessary for the efficient and safe performance of the employee's duties as enumerated in his job description.

"(b) The working condition benefit, as recommended by the civil service commission, is substantially comparable for like work and like service to that provided for the job classification and is provided to not less than 50 percent of the employees of the class in the jurisdiction covered by the salary survey."

Mr. Bernard Orsi

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December 7, 1976

In my opinion, assuming the compliance with other requirements, a working condition benefit may not be provided unless it is substantially comparable to that provided to 50% or more of the employees working in like work and like service classifications in the surveyed jurisdictions as certified by the Civil Service Commission. It does not, in my opinion, mean that said benefit need merely be provided by 50% or more of the jurisdictions surveyed.

3. Your third question inquires as to whether or not the passage of Proposition "D", and subsequent compliance therewith, creates a conflict with the provisions of the Meyers-Miliias-Brown Act (Government Code Section 3500, et seq.) In my opinion it does not.

Section 3500 of the Government Code specifically states that "nothing contained herein shall be deemed to supersede the provisions of existing state law, charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system . . ." As long as the Civil Service Commission is willing to and, when so requested, does meet and confer with employee organizations on those matters over which the Civil Service Commission has authority pursuant to the Charter sections under consideration, I see no conflict with the terms of either the Meyers-Miliias-Brown Act or the City and County of San Francisco's Employee Relations Ordinance.

Meeting and conferring on those items covered by Section 8.407 should be conducted with the Civil Service Commission and its staff and should take place prior to the time the Commission determines what prevailing rates of wages are. This conclusion appears inevitable inasmuch as it appears the Civil Service Commission is the only department authorized by the Charter to determine the prevailing wage and meeting and conferring with the Commission before that wage is determined appears to be the only time significant input from employee organizations could occur.

Very truly yours,

MCK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-65

December 14, 1976

MAR 13 1978

R. Spencer Steele
Zoning Administrator
Department of City Planning
100 Larkin Street
San Francisco, California 94102

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Subject: Board of Permit Appeals Time Limits; Delay;
Loss of Jurisdiction

Dear Mr. Steele:

This is in reply to your letters inquiring as to whether the Board of Permit Appeals loses jurisdiction of an appeal if:

1. A completed appeal is not filed within 10 days from the making or entry of the decision from which the appeal is taken;

2. A hearing is not held between the 5th and 15th day after the filing of the appeal; and

3. The Board does not reach a decision including findings within 40 days after the filing of the appeal.

1. Completed Appeal filed within 10 days

The San Francisco Municipal Code, Part III, Sec. 8 provides: "Appeals to the Board of Permit Appeals shall be taken within ten (10) days from the making or entry of the

R. Spencer Steele

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December 14, 1976

order or decision from which the appeal is taken by filing a notice of appeal with the Board of Permit Appeals and paying to said Board at such time a filing fee of ten (\$10.00) dollars." (Emphasis added.)

City Planning Code, Sec. 308.2(c) contains a further requirement as to any appeal from the action of the Zoning Administrator:

"(c) Allegations. Any notice of appeal filed pursuant to this Section shall include allegations as follows:

- "1. A notice of appeal filed from a variance decision shall set forth the particulars wherein the application for variance is alleged to have met or to have failed to meet, as the case may be, the five requirements set forth in Section 305(c).
- "2. A notice of appeal filed from any order, requirement, decision or other determination of the Zoning Administrator, other than a variance, shall set forth specifically wherein it is alleged that there was error in interpretation of the provisions of this Code, or abuse of discretion on the part of the Zoning Administrator." (Emphasis added.)

See also Charter Section 7.503 which contains a similar provision.

Therefore, pursuant to Sec. 8 and Sec. 308.2(c), and for Planning Code purposes only, a completed appeal consists of a notice of appeal and a list of allegations. However, the primary question to be answered is whether the use of "shall" in the Municipal Code and Planning Code is a mandatory limitation on Board action, or merely directory.

R. Spencer Steele

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"Shall" is not defined in Part III of the Municipal Code but is defined in Sec. 102 of the Planning Code: "The word 'shall' is mandatory and not directory."

The California Supreme Court in Russian Hill Imp. Assoc. v. Board of Permit Appeals (1967) 66 Cal.2d 34, 39, fn. 11, held this provision to be jurisdictional:

"Thus a permit issued by the permit bureau becomes final at the conclusion of the 10 day period following the order which issued that permit, if such permit has not been appealed by that time. Otherwise, the permit becomes final only at the conclusion of the 40-day period following the filing of a timely appeal."

In Francis v. Superior Court (1935) 3 Cal.2d 19, 29, the California Supreme Court stated:

"It is true that 'shall', used in a statute, does not always impart that its provisions are mandatory, although in most cases it does. . . ."

A recent case favorably commenting upon the Francis case, supra, and considering principles of interpretation, stated:

"'Shall' is construed as mandatory where failure to follow the statutory command has a result of substantial consequence."

Governing Board v. Felt (1976)
55 Cal.App.3d 156, 162.

When the appellant files a notice of appeal and the required allegations, the Department of City Planning must cease its enforcement effort on the property in question. The order is suspended by operation of law:

"Pending decision by the Board of Permit Appeals, the action from which an appeal is taken of such department, board, commission, officer or other person shall be suspended."

San Francisco Municipal Code,
Part III, Sec. 8;

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Also see Russian Hill Imp. Assoc. v. Board of Permit Appeals (1967) 66 Cal.2d 34, 38.

In my opinion, the failure to file a completed appeal raises a substantial consequence and there is a purpose served in treating the word "shall" as mandatory. Where the appellant has received an unfavorable decision and fails to file a completed notice of appeal within 10 days, the decision of the Zoning Administrator is final.

Furthermore, as stated in Ursino v. Superior Court (1974) 39 Cal.App.3d 611, 619:

"Accordingly, where a statute absolutely fixes the time within which an act is to be done it is peremptory and the act cannot be done at any other time unless during the existence of the prescribed time the time has been extended by an order made for that purpose under authority of law."

Finally, by way of analogy, the California Rules of Court, Appellate Rule 2, refers to a "notice of appeal shall be filed within 60 days . . . or within 180 days" Sec. 8 refers to taking an appeal "within ten (10) days." The time to file a notice of appeal in civil and criminal cases has always been jurisdictional in California. As a general rule, a late notice of appeal is a void notice. The right of appeal lapses. See Thompson v. Thorne (1971) 21 Cal.App.3d 797, 801, 803; Russian Hill Imp. Assoc., supra, at page 37.

I am of the opinion that the Board of Permit Appeals loses jurisdiction of an appeal if a completed appeal is not filed within 10 days from the making or entry of the decision from which the appeal is taken.

2. Hearing held between 5th and 15th day.

The San Francisco Municipal Code, Part III, Sec. 8 provides: "On the filing of any appeal, the Board of Permit Appeals . . . shall fix the time and place of hearing, which

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shall be not less than five (5) nor more than fifteen (15) days after the filing of said appeal. . . ."

In Francis v. Superior Court (1935) 3 Cal.2d 19, at page 28, the California Supreme Court laid down a general rule as follows:

"It is, of course, difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words, whether it relates to matters material or immaterial -- to the matters of convenience or of substance.' This rule appears to have met general approval in this state, as well as elsewhere. . . ."

The general rule cited above interprets whether a particular statute under review is mandatory or directory and points out that the prime test is whether the prescribed mode of action is of the essence of the thing to be accomplished. In the instant case, since the total time for action by the Board of Permit Appeals is forty (40) days, an early hearing is essential so that the total forty (40) day time period can be complied with.

Accordingly, I am of the opinion that a hearing between the 5th and 15th day after the filing of the appeal is a matter of convenience rather than of substance, and, as such, is directory rather than mandatory. Therefore, the Board would not lose jurisdiction if the hearing is not held between the 5th and 15th day after the filing of the appeal.

3. Decision including finding within 40 days

The San Francisco Municipal Code, Part III, Article 1, Sec. 8 and Sec. 14, provide:

R. Spencer Steele

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December 14, 1976

". . . the Board of Permit Appeals . . . shall act thereon not later than forty (40) days after such filing."

". . . not later than forty (40) days after the filing with it of the first appeal, the Board may concur in the action of the department . . . or may overrule the action. . . ."

City Planning Code, Sec. 308.2(e) added in 1968, defines a Board of Permit Appeals decision involving the action of the Zoning Administrator to include findings:

"(e) Decision. Upon the hearing of any appeal taken pursuant to this Section, the Board of Permit Appeals may, subject to the same limitations as are placed upon the Zoning Administrator by Charter or by this Code, approve, disapprove or modify the decision or determination appealed from, in conformity with the following requirements:

- "1. In the case of a variance application, the Board shall specify in its findings, as part of a written decision, facts sufficient to establish wherein the application meets or does not meet, as the case may be, the five requirements set forth in Section 305(c); and, if the five requirements are deemed to be met, the Board shall specify the character and extent of the variance, and shall also prescribe such conditions as are necessary to secure the objectives of this Code, in accordance with Section 305(d).
- "2. In the case of any order, requirement, decision or other determination of the Zoning Administrator, other than a variance, if the determination of the Board differs from that of the Zoning Administrator, it

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shall, in a written decision, specify wherein there was error in interpretation of the provisions of this Code, or abuse of discretion on the part of the Zoning Administrator, and shall specify in its findings, as part of such written decision, the facts relied upon in arriving at its determination." (Emphasis added.)

Topanga Assoc. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, is a definitive statement by the State Supreme Court about the subject of findings. As for variances, the Court held:

" . . . regardless of whether the local ordinance commands that the variance board set forth findings, that body must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action."

Judicial review is provided for all decisions of the Board of Permit Appeals in Code of Civil Procedure Sec. 1094.5. The Topanga court concluded at page 515:

" . . . implicit in Section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."

Therefore, pursuant to Sections 8 and 14, and City Planning Code Sec. 308.2(e), and extensive case law, I am of the opinion that the Board's decision must include findings. A decision of the Board of Permit Appeals is incomplete until the Board issues written findings and pending receipt of findings, a request for rehearing is premature.

The primary question is whether Sections 8 and 14 of Part III, Art. 1 of the Municipal Code, require a final decision (with findings as we have determined above) within 40 days of

R. Spencer Steele

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December 14, 1976

the filing of the appeal. Is the language of Sections 8 and 14 directory of mandatory?

The California Supreme Court in Russian Hill Imp. Assoc., supra, at page 42, held that: "Sections 8 and 14 of part III, art. 1 of the Municipal Code both provide that the Board of Permit Appeals must enter its final order not later than 40 days after the filing with it of the first appeal." However, the Court of Appeal in McDonald's Systems of Calif., Inc. v. Board of Permit Appeals (1975) 44 Cal.App.3d 525, 541, stated that the California Supreme Court's extension of the forty-day period to include a "final order" was gratuitous and not provided for in part III of the San Francisco Municipal Code.

In any event, the Court of Appeal in Ursino, supra, at pages 618-619, determined that the language of Sections 8 and 14 is mandatory and that any determination by the Board after the forty-day period would be void.¹

"The Municipal Code of the City and County of San Francisco provides for the method of appeal to the Board, in pertinent part, as follows: 'On the filing of any appeal, the Board . . . shall act thereon not later than forty (40) days after such filing. . . .' (Emphasis added, part III, art. 1, §8.) The same code, dealing with the hearing of and decision on the appeal, provides, in relevant part, that 'After said hearing and such further investigations as the board may deem necessary, but not later than forty (40) days after the filing with it of the first appeal, the board may concur in the action of said department . . . or may overrule the act of said department. . . .' (Emphasis added, part III, art. 1, §14.) These provisions clearly show that the legislative intent was to make these time provisions mandatory, rather than directory,

¹The Court also recognized that the 40-day limitation could be extended for good cause, e.g., nonexistence of Board members to vote to overrule Department head. Ursino, unlike McDonald's, was not concerned with rehearings allowed by Sec. 16 of the San Francisco Municipal Code.

R. Spencer Steele

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and that the designation of time was intended as a limitation of power, authority or right. (Citations.) Indeed, in Russian Hill Improvement Assn. v. Board of Permit Appeals, 66 Cal.2d 34, 39, fn. 11, 41-42, fn. 19, fn. 24 [56 Cal.Rptr. 672, 423 P.2d 824], these very same provisions were held to be jurisdictional. (Citation.)

"We observe that although the word 'shall' has been held in some cases to be directory rather than mandatory (citation), the ordinances in the present case provided that the Board 'shall act' on the appeal 'not later than' 40 days after the filing of the appeal. The phrase 'not later than' is used in both section 8 and section 14 of the Municipal Code. The use of the word 'shall' in conjunction with the phrase 'not later than' is clearly indicative of a mandatory declaration. (Citations.)

"Accordingly, where a statute absolutely fixes the time within which an act is to be done it is peremptory and the act cannot be done at any other time unless during the existence of the prescribed time the time has been extended by an order made for that purpose under authority of law. (Citations.) We apprehend, therefore, that any purported determination by the Board after the 40-day period would be in excess of the Board's jurisdiction and void."

Also see McDonald's Systems of Calif., Inc., supra, at page 531, reaffirming that the 40-day time limit is valid and mandatory.

You are advised that questions one and three articulated at the beginning of this opinion are answered in the affirmative. Question two regarding the holding of the hearing between the 5th and 15th day is answered in the negative.

Very truly yours,

GEK

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-66

December 2, 1976

Hon. George R. Moscone
Mayor
200 City Hall
San Francisco, Calif.

MAR 13 1978

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Subject: Temporary Q-2 Police Officers
as Members of Retirement System

Dear Mayor Moscone:

This will confirm the opinion heretofore given you orally that any person employed by the City and County of San Francisco to perform the duties encompassed in the Civil Service classification Q-2 Police Officer must be a member of the Police Department.

The position of police officer possesses a unique characteristic in that the occupant of that position is more than a mere employee; he is a "public" officer.

A review of the Penal Code discloses a broad spectrum of persons who are designated as "peace officers." Typically these persons are employed by the State of California or some local governmental agency in some special area of law enforcement. (Penal Code, Section 830.1 et seq.) It is clear that the matter of designating those persons who shall have "peace officer" powers is one of statewide concern. (See City Attorney's Opinion No. 66-10, dated July 19, 1966.) Consequently, the City and County of San Francisco is without authority to legislate in this area and cannot, by the adoption of any type of legislation, bestow the designation of "peace officer" on any individual or class of persons.

Insofar as is pertinent to your inquiry, Section 830.1 of the Penal Code provides that "any policeman of a city . . . is a peace officer." Designation as a peace officer and the consequent ability to exercise the powers of a "peace officer" are the basic components of the position of Q-2 Police Officer.

The Charter prescribes that -

"The police department shall consist of a police commission, a chief of police, a police force and such clerks and employees as shall be necessary and appointed pursuant to the provisions of this charter . . ."

Section 3.531 of the Charter enumerates the ranks in the Police Department and included in that enumeration is "police officer." It is clear therefore that the Charter requires that all persons who are employed by the City and County as police officers shall be members of the Police Department.

It should be noted that Sections 3.535 and 3.536 of the Charter authorize the appointment of Special Police Officers and Patrol Special Police Officers. The appointment of such an officer is sufficient to constitute him a "policeman of a city" as that term is used in Section 830.1 of the Penal Code and thereby permit him to be a "peace officer." (See City Attorney's Opinion No. 66-73, dated December 30, 1966.) However, it must be borne in mind that such special police officers are not employees of the City and County. In the case of special police officers, they are employed by an individual or firm for a special and limited security purpose. Patrol Special Police Officers are in fact private entrepreneurs who contract with various individuals and firms to provide security services. Since neither of these categories of special police officers are employees of the City and County, they are not part of the police force which makes up the Police Department pursuant to Section 3.530 of the Charter.

This will also confirm the oral opinion given you to the effect that any person appointed to the position Q-2 Police Officer will be a member of the San Francisco City and County Employees' Retirement System and entitled to the benefits provided thereunder for "members of the Police Department." Membership in the Retirement System will ensue whether the appointment to the position Q-2 Police Officer is "temporary," "limited tenure" or "permanent."

Section 8.586 of the Charter, adopted as part of Proposition L at the election held on November 2, 1976, provides that

"Those persons who become members of the police department, as defined in section 8.586-1, on or after November 2, 1976, shall be members of the [retirement] system subject to the provisions of sections [relating to police retirement benefits] . . ." (Emphasis added.)

The term "member of the police department" is defined for purposes of these sections as -

" . . . any officer or employee of the police department employed after November 1, 1976 who was or shall be subject to the charter provisions governing entrance requirements of members of the uniformed force of said department . . . ; provided, however, that such terms shall not include any person who has not satisfactorily completed such course of training as may be required by the Police Department prior to assignment to active duty with said Department." (Charter Sec. 8.586-2.)

Any person appointed to the position Q-2 Police Officer, whether "temporary," "limited tenure" or "permanent" is subject to the Charter requirements governing entrance into the uniformed force of the Police Department. (Charter Section 8.320.) Consequently, any person appointed to the position Q-2 Police Officer will be a "member of the Police Department" within the meaning of Section 8.586-1 upon completion of the required course of training and will thereupon be a member of the Retirement System under Section 8.586 and thereby entitled to all of the benefits provided thereunder.

Very truly yours,

DJG

THOMAS M. O'CONNOR
City Attorney

December 23, 1976

MAR 13 1978

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Charles R. Gain, Chief
San Francisco Police Department
Hall of Justice
850 Bryant Street
San Francisco, California 94103

Subject: Issuance of Permits for Retail Sales of Firearms;
Discretion of Chief of Police; Charter Section 3.537.

Dear Chief Gain:

You have asked for my opinion on various questions on the result of a recent hearing before the Board of Permit Appeals wherein that Board indicated that it would consider it an abuse of discretion if you were to grant any permits for the retail sales of concealable firearms.

Section 53071 of the Government Code (formerly Government Code §9619 and enacted subsequent to the decision in Galvan v. Superior Court, 70 Cal.2d 851, upholding the validity of a firearm registration ordinance against the claim of state preemption), sets forth the express intent of the Legislature "to occupy the whole field of regulation of the registration or licensing of commercially manufactured firearms as encompassed by the provisions of the Penal Code. Sippel v. Nelder, 24 Cal.App.3d 173, has held that that section preempts any local attempt for the regulation of firearms; stating at page 177:

"The record which was before the trial court in this case is such as to strongly suggest that there exists a critical need for implementation of existing firearm licensing and registration regulations. However, as appellant has so ably argued in his excellent

Charles R. Gain, Chief

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December 23, 1976

brief, this is properly a matter for the Legislature and not the courts. With the enactment of Government Code, section 9619, the Legislature resolved any possible doubt as to its intent to fully occupy the field of firearm control, both in terms of registration and licensing. Indeed, the statute could not have been worded in a clearer and less ambiguous manner. We must conclude, therefore, that the ordinance here involved, insofar as it purports to regulate the licensing or registration of firearms, is invalid."

Penal Code Section 12070 of the Dangerous Weapons' Control Law prohibits anyone from engaging in the business of the sale of concealable firearms unless licensed by a city or county, pursuant to Section 12071 of the Penal Code. This latter section states that the duly constituted licensing authority of a city or county may grant licenses to persons to engage in the sale at retail of concealable firearms.

In my opinion, therefore, it is clear that the entire field of the regulation of the registration and licensing of commercially manufactured firearms has been preempted by state law, including the licensing of persons engaged in the business of the retail sales of concealable firearms. Consequently, the only licensing permitted is by virtue of that allowed by Penal Section 12071.

In recognition of the paramount portion of state law, Section 613 et seq., of the Police Code was enacted to designate the Police Department as the licensing authority for the City and County of San Francisco for the granting in its discretion of permits under state law. (See City Attorney Letter Opinion No. 75-26.)

You first inquire whether you are bound by the mandate of the Board of Permit Appeals or must use your discretion with respect to each individual permit application.

Under Penal Code Section 12071 and Police Code Section 613.4, the granting of a permit to sell at retail concealable firearms is discretionary. As discretion is involved, you must exercise it on each application and cannot adopt a general policy of denial as was enunciated by the Board of Permit Appeals.

My conclusion is based upon the recent case of Salute v. Pitchess, 61 Cal.App.3d 557, which held that it was the duty of

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the Sheriff under the Penal Code provision relating to the licensing of persons to carry concealable weapons to make an investigation and determination, on an individual basis, on every application. In that case the Penal Code provided that a Sheriff or Police Chief may issue licenses to persons to carry concealable firearms. The Sheriff had a fixed policy of not granting any licenses under State law except in a limited number of cases involving public officers concerned for their personal safety. With respect to the Sheriff's policy the Court stated (page 560):

"We regard the case at bench as involving a refusal of the sheriff to exercise the discretion given him by the statute. Section 12050 imposes only three limits on the grant of an application to carry a concealed weapon: the applicant must be of good moral character, show good cause and be a resident of the county. To determine, in advance, as a uniform rule, that only selected public officials can show good cause is to refuse to consider the existence of good cause on the part of citizens generally and is an abuse of, and not an exercise of, discretion."

(Emphasis added.)

In answer to your question, then, you are advised that you are not bound by the mandate of the Board of Permit Appeals but must act upon and exercise your discretion on each individual permit application.

Secondly, you have asked whether Penal Code Section 12071 prevails over Section 23 of Part III of the San Francisco Municipal Code.

Section 23 of Part III of the Municipal Code allows the Tax Collector to annually renew each permit or license unless the original granting department files a written objection to such renewal.

Penal Code Section 12071 states that any license granted shall be effective for not more than one year from the date of issue. Thus, the license expires by its own terms.

Charles R. Gain

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To the extent that Section 23 in any way conflicts with Section 12071 in regard to permits to sell at retail concealable firearms, it must yield in that in this area the State has preempted licensing. Consequently, the Tax Collector may not renew said permits since by State law they expire one year from the date of issuance. Those seeking to remain in business must submit a new application to the Police Department each year.

Lastly, you ask whether you are bound by the criteria for granting a permit as set forth in Section 3.537 of the Charter.

Charter Section 3.537, in part states that the Chief of Police may refuse a permit subject to Police Department issuance if the character of the business or of the applicant does not warrant its issuance. In addition, the Chief of Police may consider the effect of the proposed business upon the surrounding property and its residents and in taking such action may exercise his sound discretion. (Section 26, Part III, San Francisco Municipal Code). These sections of the Charter and ordinance provide an overall standard governing and guiding the Chief of Police and prescribing that the exercise of his permit power must not be arbitrary but rather directed to the promotion of the public interest. (See Iscoff v. Police Commission, 222 Cal.App.2d 395, 405.)

You are advised, therefore, that in exercising your discretion in the granting of permits or licenses you are to be guided by the overall standards provided by the above enumerated sections of the Charter and Municipal Code.

Very truly yours,

EAB

THOMAS M. O'CONNOR
City Attorney

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SF City Attorney

Letter Opinion No. 76-68

December 31, 1976

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Honorable George R. Moscone
Mayor
City and County of San Francisco
200 City Hall
San Francisco, CA 94102

Subject: Conflict Of Interest - Member
Of Board Of Education

Dear Mayor Moscone:

This is in response to your recent inquiry regarding a possible conflict of interest existing where the Director of a corporation leasing space and office equipment to the San Francisco Unified School District is to be appointed to the Board of Education of the San Francisco Unified School District.

You have advised me that the School District leases the premises from the corporation at a cost of approximately Nine Thousand Dollars (\$9,000.00) a year, and leases the office equipment at a cost of approximately Three Thousand Dollars (\$3,000.00) a year. You have further advised me that the Director does not own or hold any stock in the corporation, thereby rendering Education Code Section 1175(c) inapplicable.

By letter of December 23, 1976 I advised you that the specific conflict of interest provisions of Education Code

Honorable George A. Moscone 2

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Section 1174, et seq., applied to the question of disqualification to serve on the Board of Education of the San Francisco Unified School District. The general conflict of interest provisions of Government Code Section 1090, et seq., do not apply.

The general rule is found in Education Code Section 1174:

"Section 1174. No personal interest in contract.

"No member of the governing board of any school district shall be interested in any contract made by the board of which he is a member."

The exception to Section 1174 is set out in Section 1174.5:

"Section 1174.5. Justifying circumstances.

". . . no contract or other transaction entered into by the governing board of any school district is either void or voidable under the provisions of Section 1174, nor shall any member of such board be disqualified or deemed guilty of misconduct in office under said provisions, if the circumstances specified in the following subdivisions exist:

"(a) The fact of such interest is disclosed or known to the governing board and noted in the minutes, and the governing board thereafter authorizes, approves, or ratifies the contract or transaction in good faith by a vote sufficient for the purpose without counting the vote or votes of such interested member or members, and

"(b) The contract or transaction is just and reasonable as to the school district at the time it is authorized or approved."

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Honorable George R. Moscone ?

December 31, 1976

Applying Section 1174.5 to the present inquiry, it would appear that the nominee in question would not be disqualified from serving on the Board of Education if the fact of the nominee's interest in the corporation is made known to the Board of Education and noted in the minutes, and the Board thereafter ratifies the lease transaction without the vote of the nominee.¹

As far as subsection (b) is concerned, I have no information that the lease agreement is anything but totally satisfactory to the School District.

Although ratification may take many forms, I suggest the Board of Education expressly and formally ratify the School District's lease with the corporation.

Furthermore, should your nominee become a member of the Board of Education, before each future Board transaction affecting the corporation, your nominee must disclose his interest in the corporation, have it noted in the minutes, and abstain from voting. In addition, the particular transaction must be "just and reasonable" as to the School District.

Very truly yours,

GEK

THOMAS M. O'CONNOR
City Attorney

1

To "ratify" means to approve, to confirm, as the Senate ratified the treaty; the directors met to ratify the contract. Webster's New International Dictionary, 2nd Ed. Unabridged. Ratification is a subsequent adoption. Rakestraw v. Rodrigues (1972) 8 Cal.3d 67, 104 Cal.Rptr. 57.



